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1936.

THE

LAW REPORTS

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HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITORS	RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C. A. F. TOPHAM, K.C.

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1936.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET
LONDON, W.C.1,
AND
PRINTED BY WATERLOW & SONS LTD., LONDON WALL, LONDON.

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MEMORANDUM.

On Monday, January 20, 1936, our late Most Gracious Sovereign King George the Fifth *died at Sandringham in the seventy-first year of his age and the twenty-sixth of his reign.*

His Royal Highness Edward Albert Christian George Andrew Patrick David, Prince of Wales, *was thereupon proclaimed King by the title of* Edward the Eighth.

JUDGES, LAW OFFICERS, ETC.

MEMORANDA.

1935.

Nov. 15. The Right Hon. Robert Alderson, Baron Wright, *Master of the Rolls, and* The Right Hon. Ernest Murray, Baron Hanworth, K.B.E., *were appointed to be Chairman and Member respectively of the Royal Commission on Historical Manuscripts.*

Dec. 30. *This day* The Most Hon. The Marquess of Reading, G.C.B., G.C.S.I., G.C.I.E., G.C.V.O., *sometime Lord Chief Justice of England, died at* 32, *Curzon Street, W., aged* 75.

1936.

Jan. 21. *The dignity of a Viscount was conferred upon* The Right Hon. Ernest Murray, Baron Hanworth, K.B.E., *sometime Master of the Rolls, by the name, style and title of Viscount Hanworth of Hanworth in the County of Middlesex.*

Mar. 19. Sir Donald Bradley Somervell, O.B.E., K.C., *was appointed to be His Majesty's Attorney-General in the place of the Right Hon. Sir Thomas Hobart Walker Inskip, C.B.E., K.C., appointed Minister for the Co-ordination of Defence.*

Apr. 2. Terence James O'Connor, Esq., K.C., *was appointed to be His Majesty's Solicitor-General in the place of Sir Donald Bradley Somervell.*

Apr. 3. Charles Paley Scott, Esq., K.C., *was appointed to the office of Chancellor of the County Palatine of Durham, vacant by the death of Sir Henry Arthur Colefax, K.B.E., K.C.*

May 5. Terence James O'Connor, Esq., K.C., *His Majesty's Solicitor-General, this day received the honour of Knighthood.*

May 28. *This day* The Right Hon. Sir Michael Myers, K.C.M.G., *Chief Justice of New Zealand, having been appointed a member of His Majesty's Most Honourable Privy Council on the* 17*th day of December*, 1931, *was, by His Majesty's Command, sworn, and took his place at the Board accordingly.*

May 29. *This day* The Right Hon. Lord Darling, *sometime a Justice of His Majesty's High Court of Justice, died at Lymington, Hampshire, aged* 86.

June 18. The Right Hon. Lord Wright, *Master of the Rolls, was appointed to be Chairman of the Law Revision Committee in the place of the Right Hon. Viscount Hanworth, K.B.E., who resigned the Chairmanship owing to ill-health.*

Aug. 3. *This day* The Right Hon. Alfred Tristram Baron Trevethin *of Blaengawney, sometime Lord Chief Justice of England, died near Builth Wells, Breconshire, aged* 92.

Oct. 22. *This day* The Right Hon. Ernest Murray, Viscount Hanworth, K.B.E., *sometime Master of the Rolls, died at Hythe, Kent, aged* 74.

ERRATA.

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69	footnote (1).	*The Calgarth* [1926] P. 93, 110.	*The Carlgarth* [1927] P. 93, 110.
585	12	Extinction.	Extension.
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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

THE COMMISSIONERS OF INLAND REVENUE . . . . APPELLANTS; H. L. (E.)*

1935

May 7.

AND

HIS GRACE THE DUKE OF WESTMINSTER . . . . RESPONDENT.

Revenue—Income Tax—Surtax—Annual Payments under a Deed—Salaries and Wages—Provision made for servant—Covenant—Acknowledgment in writing—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., Rule* 1; *All Schedules Rules, Rule* 19.

By a deed made in August, 1930, the respondent covenanted to pay A., a gardener in his employment, a yearly sum of 98*l.* 16*s.* by weekly payments of 1*l.* 18*s.* for a period of seven years or during the joint lives of the parties, and it was agreed that the payments were without prejudice to the remuneration to which A. should be entitled for services, if any, thereafter rendered.

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD RUSSELL of KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

Before the deed was executed the respondent's solicitors on his instructions wrote to A. a letter the material parts of which were as follows: "On the 6th inst. we read over with you a deed of covenant which the Duke of Westminster has signed in your favour. . . . . We explained that there is nothing in the deed to prevent your being entitled to and claiming full remuneration for such further work as you may do, though it is expected that in practice you will be content with the provision which is being legally made for you for so long as the deed takes effect with the addition of such sum, if any, as may be necessary to bring the total periodical payment while you are still in the Duke's service up to the amount of the salary or wages which you have lately been receiving. You said that you accepted this arrangement, and you accordingly executed the deed. . . . . If you are still quite satisfied, we propose to insert the 6th inst. as the date of the deed, and we shall be obliged by your signing the acknowledgment at the foot of this letter and returning it to us." A. signed the acknowledgment accepting the provision made for him and agreeing to the deed being dated and treated as delivered and binding on the parties thereto. The acknowledgment was stamped with a sixpenny stamp:—

Held, by Lord Tomlin, Lord Russell of Killowen, Lord Macmillan, and Lord Wright (Lord Atkin dissenting), that sums paid yearly under the above mentioned documents were annual payments within Sch. D, Case III., Rule 1, and Rule 19, s. 1, of the Rules applicable to Schedules A, B, C, D, and E of the Income Tax Act, 1918, and were not payments of salary or wages; and consequently that the respondent, being entitled to deduct tax from the payments, was entitled to deduct the payments themselves in arriving at his total income for the purposes of surtax.

Order of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal allowing an appeal by the Duke of Westminster from the decision of Finlay J. upon a special case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The question was whether certain payments made by the Duke of Westminster to various retainers and servants were annual payments within s. 27 of the Income Tax Act, 1918 (1),

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(1) Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 27, sub-s. 1: "Any person who claims exemption, abatement or relief under the preceding provisions of this Part of this Act, shall, within the time limited by this Act for the delivery of lists, declarations, and statements, or within such further time as the general commissioners for the division may for any special reason allow, deliver to the assessor of the parish in which he resides, a notice of his claim, together with a declaration and statement in the prescribed form, signed by him, setting forth—

(*a*) all the particular sources

and so admissible as deductions in arriving at the liability of the Duke for surtax for the years 1929–1930, 1930–1931 and 1931–1932.

The payments were made under various deeds of covenant

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from which his income arises, and the particular amount arising from each source;

(*b*) all particulars of any yearly interest or other annual payments, reserved or charged thereon, whereby his income is or may be diminished." . . . .

Schedule D, s. 2. "Tax under this Schedule shall be charged under the following cases respectively; that is to say,— . . . .

"Case III. Tax in respect of profits of an uncertain value and of other income described in the Rules applicable to this case;" . . . .

Rules applicable to Case III.

Rule 1. "The tax shall extend to—

(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable . . . . either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise . . . . or as a personal debt or obligation by virtue of any contract." . . . .

Rules applicable to Schedules A, B, C, D and E.

Rule 19, s. 1. "Where any yearly interest of money, annuity, or any other annual payment (whether payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise . . . . or as a personal debt or obligation by virtue of any contract, or whether payable half-yearly or at any shorter or more distant periods), is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due.

"The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid."

Rule 21, sub-s. 1: "Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D . . . . the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

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and written acknowledgments stamped as agreements. The deeds were not all exactly in the same form. One deed, in which one Frank Allman, a gardener, was the covenantee, was taken as typical. This deed, with the acknowledgment signed by Allman, is set out in full in the opinion of Lord Atkin and is summarized in the headnote. In one case, that of Mr. Detmar Jennings Blow, there was no acknowledgment in writing.

Para. 6 of the special case was as follows: " It was admitted that all the covenantees were in fact getting under their deeds of covenant (with or without other moneys) the amounts which they would respectively have received as wages or salary if they lived during the period and continued in their employment and that if they ceased to work the payments secured by the deed must still be made. It was also admitted on behalf of the respondents," i.e., the Commissioners, " that in the case of an employee of the appellant," i.e., the Duke of Westminster, " who ceased to be in that employment at the date of the deed applicable to his case the payments made under that deed by the appellant were proper deductions in computation of his surtax income and that such payments made to any employee who though in the appellant's employment at the before mentioned date ceased to be in that employment during the period covered by the deed were also—in respect of the period after retirement of the employee—proper deductions in computation of the appellant's surtax income. This case accordingly concerns only the payments made by the appellant in respect of periods during which the covenantees were in the appellant's service. In some cases in which like deeds or substantially similar deeds were entered into the covenantees had retired and were still being paid under the deeds."

The Duke of Westminster appealed against assessment to surtax for the three years above mentioned, claiming that in computing the amount of his total income liable to surtax he was entitled to exclude the payments made under the deeds during the three years. The Commissioners of Income Tax decided that, except as regards payments to such of the covenantees as had already left the service of the Duke, all payments under the deeds were in effect payments for services to be rendered to the Duke of Westminster, and were not allowable as deductions from his income. From this decision the Duke of Westminster appealed by way of a special case stated under s. 42, sub-s. 7 (*d*), of the Finance Act, 1927, and s. 149 of the Income Tax Act, 1918.

The special case was heard before Finlay J. The learned judge dismissed the appeal. On an appeal by the Duke of Westminster to the Court of Appeal, Lord Hanworth M.R. and Slesser and Romer L.JJ., allowed the appeal and reversed the decision of the Commissioners of Inland Revenue.

The Commissioners appealed to this House.

March 12. *Sir Thomas Inskip A.-G.* and *R. P. Hills* for the appellants. The effect of s. 27, sub-s. 1, of the Income Tax Act, 1918, Rule 1 applicable to Case III. of Sch. D, Rule 19, s. 1, of the Rules applicable to All Schedules, and ss. 38 and 39 of the Finance Act, 1927, is that, where a payer makes a payment of salary or wages, income tax cannot be deducted by the payer from the salary or wages, and the payer is not entitled to deduct the amounts paid in computing his total income liable to surtax ; but where he makes payment of an annual sum within Sch. D income tax can be deducted from the annual sum and the payer is entitled to deduct the amounts paid in computing his total income. The question in this appeal is therefore whether the payments made by the respondent to Allman are salaries, fees or wages, other than those mentioned in Sch. E, Rules 1 and 6, or whether they are " annual payments " within Sch. D. If the deed of covenant were the only document to be considered there would be good ground for holding that the payments made under it were annual payments " payable . . . . as a personal debt or obligation by virtue of " a " contract," within Sch. D, Case III., Rule 1. But the deed is not to be so considered ; it must be read with the written acknowledgment of Allman, and then it is clear that the deed was merely a method of paying salary or wages in whole or in part. The agreement between the parties was made on August 6. It is embodied in the acknowledgment dated August 13 and the deed dated August 14, both instruments being taken by agreement as made on August 6. That being so, there is ample evidence to support the finding of the Commissioners that the payments made under the deed were in substance payments for continuing service ejusdem generis with wages or salaries, and were not annual payments properly to be deducted from the respondent's assessment to surtax. The substance of the transaction is to be regarded, and not merely the form: *Helby* v. *Matthews* (1); *Attorney-General* v. *Worrall* (2); *Secretary of State in Council of India* v. *Scoble* (3); *Lethbridge* v. *Attorney-General* (4); *Earl Howe* v. *Inland Revenue Commissioners*. (5)

March 20. *Wilfrid Greene K.C.*, *Raymond Needham K.C.*, *Cleveland-Stevens K.C.*, and *Cyril L. King* for the respondent. Surtax is an additional duty of income tax: Finance (1909–10) Act, 1910, s. 68, sub-s. 1; Finance Act, 1927, s. 38. Therefore deductions permissible in assessing an income to income tax are permissible in assessing an income to surtax. Wages and salaries paid to servants and retainers cannot be deducted. They and certain other payments, for example premiums on policies of insurance, are regarded as means of spending money. It is otherwise with annual payments payable "by virtue of any deed . . . . or as a personal debt or obligation by virtue of any contract": Rule 1 applicable to Case III. of Sch. D. Here the amounts payable are regarded as the income of the payees. The payer may deduct a sum representing the tax thereon at the rate in force at the time when the payments were accruing: Rule 19 applicable to Case III. of Sch. D; and he does not include them in computing his taxable income.

Upon the crucial question in the case, namely whether the payments made to Allman fall within Sch. E or Sch. D, Case III., Rule 1, it is not suggested that the deed is other than a real deed; it is not a mere pretence designed to disguise the real relation between the parties.

(1) [1895] A. C. 471, 475.
(2) [1895] 1 Q. B. 99, 104, 105.
(3) [1903] A. C. 299, 302.
(4) [1907] A. C. 19, 26.
(5) [1919] 2 K. B. 336.

No doubt the substance of the transaction is to be regarded. The substance of a transaction is its legal effect: *In re Hinckes, Dashwood* v. *Hinckes* (1); and the case has to be decided on the tenour of the deed as it stands: *Union Cold Storage Co.* v. *Adamson.* (2)

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Sir Thomas Inskip A.-G. replied.

The House took time for consideration.

May 7. LORD ATKIN. My Lords, in the year 1930 and in subsequent years the respondent the Duke of Westminster executed a series of deeds in which he covenanted to pay to the several parties mentioned in the deed certain weekly sums for a period of seven years or the joint lives of the parties. The recipients in all the cases in question were persons then in the employ of the respondent at fixed wages or salaries: and after the completion of the deeds they continued in the employment and continued to receive such sums as with the sum payable by the deed made up the amount of the wages or salary payable before the deed and no more. The sums varied from 12*s.* to 2000*l.*; the employment from gardener and laundryman to architect; and the past periods of employment from four years to forty-five. The Crown say that the payments made under the deed were made in the circumstances given in evidence as remuneration for services, and could not be deducted from the respondent's total income for purposes of surtax. The respondent says that the payments were annual payments which he was entitled to deduct. It is agreed between the parties that the question in this case is whether the payments were for remuneration of services or not: if the former the respondent is chargeable: otherwise not. It is unnecessary, therefore, to trouble your Lordships with the various relevant sections and rules of the Income Tax Act, 1918, and subsequent Finance Acts. It is sufficient to say that your Lordships were satisfied that the admission was correct.

It was not, I think, denied—at any rate it is incontrovertible—that the deeds were brought into existence as a device by which the respondent might avoid some of the burden of surtax. I do not use the word device in any sinister sense, for it has to be recognized that the subject, whether poor and humble or wealthy and noble, has the legal right so to dispose of his capital and income as to attract upon himself the least amount of tax. The only function of a Court of law is to determine the legal result of his dispositions so far as they affect tax. In the present case Finlay J., affirming the Commissioners, decided in favour of the Crown, while the Court of Appeal have set aside that decision and given judgment in favour of the respondent.

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(1) [1921] 1 Ch. 475, 489. (2) (1930) 16 Tax Cas. 293, 322.

The Commissioners have taken six cases as typical in which the documents differ slightly in form, but in their opinion have the same effect. They chose for special example the case of Frank Allman, a gardener, and I will adopt the same course, though reference may have to be made later to some of the other instances.

The deed is in the following terms :—

" This deed of covenant is made this fourteenth day of August one thousand nine hundred and thirty between The Most Noble Hugh Richard Arthur Duke of Westminster, D.S.O. (hereinafter called ' the Duke ') of the one part and Frank Allman of Vine Cottage Aldford near Chester Gardener in the Duke's service (hereinafter called ' the Annuitant ') of the other part Whereas in recognition of the services which for over twenty-seven years past the Annuitant has well and faithfully rendered to the Duke the Duke desires to make provision for the Annuitant in manner hereinafter expressed notwithstanding that the Annuitant may re-engage or continue in the service of the Duke in which event he will become entitled to remuneration in respect of such future services Now this deed made in furtherance of the Duke's said desire and in consideration of the past services so rendered as aforesaid witnesses as follows :—

" 1. The Duke covenants to pay to the Annuitant as from the 2nd day of August one thousand nine hundred and thirty during the joint lives of himself and of the Annuitant or for a period of seven years the weekly sum of One pound eighteen

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shillings (amounting in each year to the sum of Ninety-eight pounds sixteen shillings) the first of such payments having fallen to be made on the 9th day of August 1930.

"2. The said payment shall be made from time to time on such days for such periods and in such proportions as shall from time to time be mutually agreed upon by the parties hereto and in default of agreement shall be made in weekly payments on the Saturday of each week.

"3. It is hereby expressly agreed that the said payments are without prejudice to such remuneration as the Annuitant will become entitled to in respect of such services (if any) as the Annuitant may hereafter render to the Duke.

"In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written."

"Signed sealed and delivered by the above named Hugh Richard Arthur Duke of Westminster in the presence of :— } WESTMINSTER (L.S.

St. G. CLOWES, Broadwater, Framlingham, Capt. : late 19th Hussars.

"Signed sealed and delivered by the above named Frank Allman in the presence of :— } FRANK ALLMAN (L.S.)

F. A. CARLTON SMITH, The Grosvenor Office, 53 Davies Street, London, W.1, Solicitor."

Counsel for the respondent took the view that the period of the covenant was the joint lives or seven years whichever was the shorter; and that the deed was to be without prejudice to the recipient receiving full remuneration for his future services. I shall assume that this construction is correct. No contention was raised in the present case that the payments, though expressed to be weekly, were not annual payments within the Income Tax Act and Rules.

It will be convenient to consider the legal relations which would exist between the Duke and his servant on the supposition, which is that of the respondent, that the deed came into force without any further agreement of any kind being made between the parties.

The servant was serving the Duke under a contract of employment under which he was entitled to receive an agreed weekly wage of, we will suppose, 3*l.*; which contract would continue until terminated by notice or summarily, or until varied by agreement. On this footing when the deed came into operation the servant remaining in the employment would be entitled to 38*s*. a week in addition to the 60*s*. wages, and it is obvious that, so far from benefiting himself by avoiding income tax, the Duke would be adding several thousand pounds annually to his expenditure. I conceive it to be self-evident that no single party to the transaction ever contemplated that the servant would in fact draw the full contract wages in addition to the 38*s*. under the deed. And in fact as we learn from the case the servant after the deed continued to receive weekly the exact former amount of his wages 60*s*., i.e., he received 38*s*. and such additional sum as made the total weekly payment the equivalent of his contractual wages. We are to assume, however, on the respondent's contention, that no contract was made modifying either the terms of the deed or the contract of employment. The position of the Duke therefore was that assuming the servant was content to draw only 60*s*. a week the Duke would remain at all times liable to pay to the servant the arrears of the contractual wages, i.e., 60*s*. minus 22*s*., in other words a sum equal to the payment under the deed. However long a time the service continued, the servant would be entitled to this sum within the limit, if the Duke of Westminster chose to plead the Statute of Limitations, of six years' arrears. The arrears would be a debt due to the servant and could be attached by any creditor of the servant, and would on death be assets of his which his personal representative would be bound to recover. It is perhaps worth mentioning that if in fact the Duke were only paying as wages 22*s*. peculiar results might follow if the wages were regulated by statute as by the Agricultural Wages Act or similar legislation; but as we have no evidence of such a position it is unnecessary to dwell on it. A nice question might also arise as to the amount which the Duke would be bound to tender as wages in lieu of notice.

The embarrassments, however, are not all on the Duke's side. One result to the servant, perhaps unexpected, would be that, his total income having become 98*s*. a week, he would incur liability to income tax; for salary or wages that he is entitled to, but voluntarily forgoes, must be included in his total income. And on what footing his "earnings" in his last employment would be calculated for purposes of workmen's compensation, whether on 22*s*. or 60*s*., is a problem which I am glad we have not to decide.

This being the position if the matter rested upon the deed and no more, it seems to me plain that the Duke's advisers were not prepared to leave him exposed to the liabilities I have mentioned. In every case before the deed became operative a letter was written by the Duke's solicitors to the servant the effect of which seems to me to be the material question in this case. The letter is not in the same form in every case though its effect is the same. In Allman's case it is on a typed form and is signed by the solicitors over a 6*d*. stamp. It is as follows:—

"PRIVATE.
The Grosvenor Office,
53, Davies Street,
Berkeley Square, London, W.1.

"To Mr. Frank Allman. 13th August, 1930.

"Dear Sir,

"On Wednesday the 6th instant we read over with you a Deed of Covenant which the Duke of Westminster has signed in your favour under which you will be entitled to a gross sum of 1*l*. 18*s*. 0*d*. a week in consideration of your past faithful service and irrespective of any work which you may do for His Grace after the deed comes into effect. The deed will be in force for seven years if you and the Duke should so long live, and His Grace can reconsider the position at the end of that period. We explained that there is nothing in the deed to prevent your being entitled to and claiming full remuneration for such future work as you may do, though it is expected that in practice you will be content with the provision which is being legally made for you for so long as the deed takes effect, with the addition of such sum (if any) as may be necessary to bring the total periodical payment while you are still in the Duke's service up to the amount of the salary or wages which you have lately been receiving.

" You said that you accepted this arrangement, and you accordingly executed the deed.

" We write, as promised, to confirm the explanation which we gave you on the 6th instant. If you are still quite satisfied we propose to insert the 6th instant as the date of the deed and we shall be obliged by your signing the acknowledgment at the foot of this letter and then returning it to us.

Yours faithfully,
BOODLE, HATFIELD & Co.
Stamp 6*d*.

ACKNOWLEDGMENT.

" To the Duke of Westminster, D.S.O.
" And to Messrs. Boodle, Hatfield & Co., his Solicitors.

" I have read the above written letter, and I confirm that I accept the provision made for me by the deed. I agree to the deed being dated and treated as delivered by and binding upon the Duke of Westminster and myself.

FRANK ALLMAN."

It will be observed from the letter that on August 6, the solicitors had produced to the servant the deed already executed by the Duke but undated and had made the explanation set out in the letter; that the servant had accepted " this arrangement," and had executed the deed. Now what was the object of the letter and the signed acknowledgment which formed part of the document? The respondent gravely says merely to provide evidence that the servant was satisfied with the provision made for him by the deed and to protect the Duke against claims against him in the future for any increased pension. But the servant in no case had any legal claim to pension; in any case the deed was not to last for more than seven years; and finally, and as

I suggest, conclusively, the servant had already signified his acceptance of the provision made in the deed by executing it "accordingly." Execution by the servant had been in law unnecessary.

In my opinion the facts and the terms of the letter indicate that the transaction was intended to have, and had, far more substantial results than the interchange of unnecessary assurances between master and servant. The document was intended to bind the servant, exactly to what terms I will shortly discuss. They must depend on the terms of the letter. But that the document was intended to be contractual is a conclusion that I find irresistible. For what reason is the signature of the solicitors placed by them over a contract stamp? Can there be any reason except that they thought that the letter contained an offer of a contract which would be completed by the signature of the acknowledgment by the party to whom it was addressed? I am satisfied that a letter signed over a contract stamp and requiring the addressee to return it with the appended acknowledgment signed, addressed by the employer's solicitors to a workman at weekly wages would inevitably be understood by the recipient and would be intended by the writers to be understood as a representation that he was being asked to make a contract in the terms of the document.

It still remains to consider whether the document discloses the parties to be agreed and sufficiently defines the terms. I have already pointed out the urgent necessity there was to relieve the Duke from the obligations which would exist if the deed stood alone. I read the letter as saying there is nothing in the deed to prevent your claiming 60*s.* in addition to the sum mentioned in the deed, but you are expected in practice to be content with the provision, etc., with the addition, etc. You have already said that you accept this arrangement, and will you now bind yourself by a formal contract to this effect? The acknowledgment, " I confirm that I accept the provision made for me in the deed," in my opinion plainly relates to the only matter previously recited as being said by the servant —namely, I confirm that I accept this arrangement; and the arrangement is that I will be content with the provision in the deed with the addition, etc., of any sum necessary, etc.

We are thus, I think, inevitably forced to the conclusion that before the deed was executed there was a contract between master and servant as to the effect of the deed on the existing contract of service.

The only remaining question is relatively simple. Is the contract one which radically alters the terms of the existing contract of service—I will make a new contract of service and I will serve you as gardener for *22s.* a week; or, as in some of the other cases, I will serve you for nothing; or is it a contract which maintains the existing contract of service—I will continue to serve you as gardener for 60*s.* a week; but I will take in payment of that 60*s.*, as to 38*s.*, the payment under the deed, and as to the balance, the ordinary weekly payment. In the latter case the employer remains under an obligation to pay 60*s.*: and discharges 38*s.* of that obligation by making the payment under the deed, which has been delivered with that bargain in existence.

I quite agree that the former is a possible bargain. A servant may agree to work for nothing, or for some sum which is merely a fraction of the current rates of wages. But such agreements are in my experience very exceptional. In the present case they would apply, it is said, to about 100 employees. And I cannot contemplate so many servants consciously making bargains so alien to their traditions and for a period which would not be longer than seven years and might be shorter. The better construction appears to me to be that the servants were never asked to abandon the existing contractual rate. If it were otherwise one bears in mind the strange position of what were neatly called the uncovenanted servants, serving for higher wages, together with the other difficulties earlier referred to as to wages statutes and wages in lieu of notice.

With great respect to the members of the Court of Appeal they seem to ignore what seems to me the essential fact of the document of August 13 signed by both parties. Slesser L.J. alone makes what seems to me the necessary assumption that it is contractual, but for the reasons given I cannot assent to his view of the ensuing legal effect. Nor am I impressed with the fact that the deed would have a different effect on the surtax liability of the Duke if later he did not happen to be employing the recipient. That seems to me a very ordinary result if the circumstances of the covenantor and covenantee alter for income tax purposes. The fact is that what would make the difference in the tax position would be that the recipient would no longer be employed; the letter would not be in operation; and there could be no ground for alleging that the Duke was paying the money as remuneration.

I do not myself see any difficulty in the view taken by the Commissioners and Finlay J. that the substance of the transaction was that what was being paid was remuneration. Both the Commissioners and Finlay J. took the document of August 13 into consideration as part of the whole transaction, and in my opinion rightly. I agree that you must not go beyond the legal effect of the agreements and conveyances made, construed in accordance with ordinary rules in reference to all the surrounding circumstances. So construed the correct view of the legal effect of the documents appears to me to be the result I have mentioned. I think the difficulty has probably arisen from the wording of the Commissioners' finding that "the payments made under the deed were in substance" payments by way of remuneration. Standing alone I do not think that phrase would be justified. But reference to the immediately preceding sentence indicates that the Commissioners had taken into consideration the letters and form of acknowledgment before expressing their finding as above. Though they have not analysed the transaction as fully as I have endeavoured to do, I have little doubt that they and Finlay J. arrived at the same result as I, and it may be noted that so far as there is any question of fact involved, the finding of the Commissioners, if there is evidence, is final.

Basing as I do my conclusion on the preliminary contract contained in the letter and acknowledgment I find myself unable to accept the Commissioners' conclusion in the case of Mr. Detmar Blow. No letter appears to have been written to him and there was no evidence before the Commissioners as to any agreement made with him. In those circumstances on the facts as they were made known to the Commissioners it appears necessary to treat the legal relations between him and the Duke in respect of the payment of 2000*l.* a year as governed by the deed alone. The assessment therefore should be reduced by that sum. Except as thus varied, in my opinion the order of the Commissioners should be restored and the appeal allowed with costs here and below.

LORD TOMLIN. My Lords, it cannot I think be doubted that each one of the annuities payable under the deeds of covenant brought to your Lordships' attention, if considered with reference to the deed creating it and without regard to the other matters upon which the appellants rely, falls into that class of payments which are treated as part of the taxable income of the payee and not of the payer. Each annuity is on this footing therefore an item from which the payer is entitled to deduct income tax and which he is entitled to treat as deductible from his total income in making his return for surtax purposes.

So far as concerns the annuity payable to Detmar Jennings Blow I can discover no element in the case which upon any view of the law or facts can alter the position as I have stated it, and in my opinion the appeal in regard to this annuity must fail.

With regard to the other annuities, the correspondence in each case contemporaneous with or following upon the execution of the deed of covenant, together with the fact that after the deed the payee, being in the Duke's employment, was in fact getting under the deed (with or without other moneys) the amount which he would have received as salary or wages if no deed had been executed, is said by the appellants to alter the whole position and, so long as the payee continues in the Duke's service, to render it impossible for the Duke to treat the annuity under the deed as a deductible item in his return of income for surtax purposes.

It is agreed that as between the annuities under consideration (other than that of Blow) no distinction can be drawn and that Allman's annuity is typical. A decision in Allman's case must therefore govern the remainder.

Now so far as I understand the argument the appellants, while admitting that Allman's annuity is payable under the deed, say that there is, having regard to the correspondence and in all the circumstances, another collateral contract between the Duke and the payee to the effect that the payee will serve the Duke in consideration of a salary or wage equal to the salary or wage he was receiving before the deed of covenant was executed, and that he will accept what he receives under the deed in part satisfaction of this salary or wage; and therefore that the annuity, so long as the payee remains in the Duke's service, is of a changed nature and is no longer a payment which the Duke is entitled to deduct from his income for the purposes of surtax.

In the first place I would observe that, if any such contract is proper to be inferred from the correspondence and circumstances, the contract must be a separate independent contract in the case of each payee and could only be inferred from a full examination of each case separately, and, unless the contract alleged is wholly in the correspondence, only after hearing evidence from the parties to the alleged contract or their representatives. In fact no evidence of this kind was called before the Commissioners and the Commissioners have not found that any such contract existed. Their only finding is expressed in para. 11 of the case stated and is as follows:—

"11. We, the Commissioners who heard the appeal, held that in construing the true effect and substance of the deeds under which payments are made to the appellant's (1) employees, we were entitled to consider together with these deeds the letters of explanation and form of acknowledgment which were sent to the covenantees. These letters, like the deeds themselves, were not in one stereotyped form, but were sufficiently to the same effect to enable us to arrive at a decision in respect of them all. We held that the payments made under these deeds to persons who remain in the appellant's employ were, in substance, payments for continuing service ejusdem generis with wages or salaries so long as the recipients in fact remain in the appellant's service and as such were not annual payments which were a proper deduction from his assessment to surtax."

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(1) The respondent in this appeal was the appellant in the special case before the Commissioners.

I will deal later with that part of the finding which says that the payments were "in substance" payments for continuing service ejusdem generis with salaries or wages.

In the next place I would note that a contract in the terms alleged is nothing more than a contract that the payee will serve the Duke for a salary or wage equal to the difference between the amount received under the deed and the amount of the original salary or wage. In any event, whether he serves the Duke or not, the payee is entitled under the deed to the amount of the annuity less tax, and the annuity already legally payable cannot become part of the consideration for a new contract of service.

Again, such a contract if it could be inferred at all is in flat contradiction of the deed. Under the deed the payments are expressed to be without prejudice to such remuneration as the annuitant would become entitled to in respect of such services (if any) as the annuitant might thereafter render to the Duke. It is also in flat contradiction of the terms of the letter to which I will presently refer.

In fact I do not think that upon the true construction of the relevant letter and written acknowledgment, even when regarded in the light of such facts as are admitted or found in para. 6 of the case stated, there was any such collateral contract as alleged. The letter of August 13, 1930, told the annuitant that there was nothing in the deed to prevent his being entitled to and claiming full remuneration for such future work as he might do, though it was expected that in practice he would be content in effect with the difference between the annuity and salary or wages which he had been lately receiving. I cannot think that a letter so framed can be construed as constituting a contract that the payee would serve the Duke upon terms in contradiction of the language of the letter—namely, that he should be entitled to less than the salary or wages which he had been then lately receiving. Further, the arrangement which the annuitant is stated in the letter to have accepted must, I think, on a proper reading of the letter refer to all that is set out in the letter as well as what is contained in the deed, and includes his right to full remuneration over and above what is received under the deed. Again, the acknowledgment signed by the annuitant at the foot of the letter is that he accepts the provision made for him by the deed, and that is a provision without prejudice to his right to full remuneration over and above what he receives under the deed. In short, it seems to me that there is no such contract as that which the appellants suggest can be inferred.

Apart, however, from the question of contract with which I have dealt, it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter," and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the incertain and crooked cord of discretion" for "the golden and streight metwand of the law." (1) Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an

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(1) 4 Inst. 41.

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increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

The principal passages relied upon are from opinions of Lord Herschell and Lord Halsbury in your Lordships' House. Lord Herschell L.C. in *Helby* v. *Matthews* (1) observed: "It is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree;" but he went on to explain that the substance must be ascertained by a consideration of the rights and obligations of the parties to be derived from a consideration of the whole of the agreement. In short Lord Herschell was saying that the substance of a transaction embodied in a written instrument is to be found by construing the document as a whole.

Support has also been sought by the appellants from the language of Lord Halsbury L.C. in *Secretary of State in Council of India* v. *Scoble*. (2) There Lord Halsbury said: "Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words), this is not the case of a purchase of an annuity." Here again Lord Halsbury is only giving utterance to the indisputable rule that the surrounding circumstances must be regarded in construing a document.

Neither of these passages in my opinion affords the appellants any support or has any application to the present case. The matter was put accurately by my noble and learned friend Lord Warrington of Clyffe when as Warrington L.J. in *In re Hinckes, Dashwood* v. *Hinckes* (3) he used these words: "It is said we must go behind the form and look at the substance . . . . but, in order to ascertain the substance, I must look at the legal effect of the bargain which the parties have entered into." So here the substance is that which results from the legal rights and obligations of the parties ascertained upon

(1) [1895] A. C. 471, 475.
(2) [1903] A. C. 299, 302.
(3) [1921] 1 Ch. 475, 489.

ordinary legal principles, and, having regard to what I have already said, the conclusion must be that each annuitant is entitled to an annuity which as between himself and the payer is liable to deduction of income tax by the payer and which the payer is entitled to treat as a deduction from his total income for surtax purposes.

There may, of course, be cases where documents are not bona fide nor intended to be acted upon, but are only used as a cloak to conceal a different transaction. No such case is made or even suggested here. The deeds of covenant are admittedly bona fide and have been given their proper legal operation. They cannot be ignored or treated as operating in some different way because as a result less duty is payable than would have been the case if some other arrangement (called for the purpose of the appellants' argument "the substance") had been made.

I find myself, therefore, in regard to the annuities other than that of Blow, unable to take the same view as the noble and learned Lord upon the Woolsack.

In my opinion in regard to all the annuities the appeal fails and ought to be dismissed with costs.

LORD RUSSELL OF KILLOWEN. My Lords, I would dismiss this appeal.

It is conceded that the deeds are genuine deeds, i.e., that they were intended to create and do create a legal liability on the Duke to pay in weekly payments the annual sum specified in each deed, whether or not any service is being rendered to the Duke by the covenantee. Further, it is conceded that the sums specified in the deeds were paid to the covenantees under the deeds.

The question for our decision is whether those sums so paid constitute part of the Duke's income for the purpose of computing his liability for surtax in the particular years in question.

I need not consider in detail the various statutory provisions which are relevant to the consideration of this matter. The result may for the purposes of this case be summarized thus :

If the payment of these sums is payment of salary or wages within Sch. E (1), from which tax is not deductible by the Duke, then he is not entitled to exclude the amounts paid in ascertaining his total income for surtax purposes, but if the payment is an annual payment within Sch. D, from which tax is deductible by the Duke, then he is entitled to exclude the amounts paid in ascertaining such total income.

There can I think be no doubt that if the deeds stood alone the payments are annual payments within Sch. D. Indeed, this is not I think disputed. It is, however, argued that certain letters written by the Duke's solicitor to the covenantees and certain acknowledgments signed by the covenantees at the foot of those letters, effect a complete change in the situation, and turn the payments made under the deeds into payments of salary and wages within Sch. E.

I will consider this suggestion in relation to the case of Frank Allman. The argument centred round his case, and it was common ground that all the cases (with the exception of the case of Mr. Blow) stood or fell together notwithstanding any difference of wording which might exist among them.

The legal position created by Allman's deed is clear. He is entitled during the defined period to his annual sum of 98*l*. 16*s*. by weekly payments of 1*l*. 18*s*., commencing on August 9, 1930. He is not bound to do a stroke of work in order to be entitled to payment. If he does in the future render any service to the Duke, he will be legally entitled to claim remuneration for it, over and above the payments under the deed, which are to be without prejudice to his remuneration for future services. The deed expressly so provides.

The letter to Allman states the effect of the deed, but says that it is expected that in practice he will be content with the legal provision made by the deed " with the addition of such sum (if any) as may be necessary to bring the total periodical payment while you are still in the Duke's service up to the amount of the salary or wages which you have lately been receiving." That is an expression of hope or anticipation, that the covenantee will not enforce his legal right to

(1) See Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 18, sub-ss. 1, 2.

remuneration for future services beyond a certain amount. The letter states that the covenantee had "accepted this arrangement" and asks him to sign an acknowledgment in a form already written out at the foot of the letter. The arrangement said to have been accepted can be nothing more than what the letter states—namely, the execution of a deed which was to be binding and in full force, coupled with an expectation on the part of the Duke that the covenantee's legal right to full remuneration for future services would not be enforced. There is no evidence of any other arrangement. Acceptance of that arrangement cannot turn the expectation into an enforceable legal right. The acknowledgment signed by the covenantee is in strictly limited terms. It accepts the provision made by the deed; it in no way admits or suggests that the deed has to any extent been qualified by the letter. My Lords, for myself I can find nothing in the letter and acknowledgment which constitutes or resembles a contract, notwithstanding the fact that the names of the solicitors were written across an adhesive stamp. There is an expression of a hope or anticipation or expectation that the covenantee will pursue a certain line of conduct, but he nowhere binds himself to do so, nor indeed is he even asked to do so. In my opinion the letter has no operation at all, and has no effect upon the legal rights and liabilities of the parties created by the deed.

But if I am wrong in this view, and some contract dehors the deed was brought into existence by means of the letter and acknowledgment, it can be no more than a contract by Allman that his remuneration for future services shall not be full remuneration but only the additional sum referred to in the letter. I can see no grounds for extracting from the language used a contract that the remuneration for future services shall, despite the deed, be the sums payable under the deed in respect of past services plus the additional sum mentioned in the letter. I can find no possible justification for this. A suggestion was made that such a contract can be found by reason of the presence in the letter of the words "to bring the total periodical payment up to the amount of the salary which you were receiving previously to the deed of covenant." I fail to see how these words can bear this strain. Indeed, to me they seem to point in the opposite direction. They recognize that full remuneration for future services will not be paid, and that the total periodical payment will be composed in part of salary and in part of something which is not salary at all.

If the true view is that (contrary to my opinion) a contract has been made to accept less than full remuneration for future services, the position is still the same—namely, that the legal rights and liabilities of the parties created by the deed remain unqualified and unaffected.

The result is that payments, the liability for which arises only under the deed, are not and cannot be said to be payments of salary or wages within Sch. E. They cannot with any regard to the true legal position be said to arise from an employment. They are, and can only be said to be, annual payments within Sch. D. Tax was deductible on payment; they are income of the recipient, and are accordingly not part of the Duke's total income for the purpose of calculating his liability for surtax.

The Commissioners and Finlay J. took the opposite view on the ground that (as they said) looking at the substance of the thing the payments were payments of wages. This simply means that the true legal position is disregarded, and a different legal right and liability substituted in the place of the legal right and liability which the parties have created. I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. As Lord Cairns said many years ago in *Partington* v. *Attorney-General* (1): " As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.'' If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of *Secretary of State in Council of India* v. *Scoble* (1); that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine.

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(1) (1869) L. R. 4 H. L. 100, 122.

The substance of the transaction between Allman and the Duke is in my opinion to be found and to be found only by ascertaining their respective rights and liabilities under the deed, the legal effect of which is what I have already stated.

The case of Mr. Blow's deed, which is uncomplicated by any letter, is necessarily decided, in my view, in the same way as Allman's case.

For these reasons I am of opinion that the order of the Court of Appeal was right and ought to be affirmed.

LORD MACMILLAN. My Lords, the respondent recently entered into certain transactions with a number of his employees, and the question to be determined in this appeal is whether these transactions have affected his liability to surtax. It has been agreed that, to test the matter, the respondent's transaction with Frank Allman may be taken as typical of the series.

Allman was employed by the respondent as a gardener at a weekly wage the amount of which is not stated, but which was in excess of 38*s*. a week. The wages paid by the respondent to Allman were profits arising to Allman from

(1) [1903] A. C. 299.

his employment within the meaning of Sch. E to the Income Tax Act, 1918. Consequently the respondent was not entitled to deduct tax on paying Allman his wages, nor was he entitled to deduct his payments to Allman in computing his total income for surtax purposes. This being the position of the parties, they executed in 1930 a deed of covenant which has been quoted in full by my noble and learned friend Lord Atkin.

It is agreed on all hands that the legal effect of this deed was to give Allman thereafter for the period of its endurance the right to a weekly payment of 38*s*. irrespective of whether he remained in the respondent's employment or not, but without prejudice to Allman's right to remuneration for such services as he might thereafter render to the respondent. I do not think that there can be any doubt, and indeed none was suggested, that, if this deed had stood alone, the sums paid to Allman in pursuance of it would have been of the nature of an annual payment payable as a personal debt or obligation by virtue of a contract within the meaning of Rule 1 applicable to Case III. of Sch. D, with the result of entitling the respondent, under Rule 19, sub-s. 1, of the Rules applicable to all the Schedules, to deduct income tax on making the covenanted payments to Allman, and consequently to deduct the amount of these payments in computing his total income for surtax purposes.

But the deed of covenant did not stand alone. There were in addition a letter addressed to Allman by the respondent's solicitors and an acknowledgment by Allman, which have also been quoted in full by my noble and learned friend. In my opinion these two documents formed part of the transaction between the parties. It has been suggested that they had no legal efficacy. The respondent's solicitors do not appear to have held that view. They may have been mistaken in their belief that the letter and the acknowledgment embodied a binding arrangement, but I confess that I share it. In my opinion these documents embody an agreement between the parties that, notwithstanding Allman's unqualified right under the deed to 38*s*. a week, work or no work, and to full remuneration for any future work he may do for the respondent, nevertheless, so long as he remains in the respondent's employment, he will be content with the covenanted payments under the deed plus the difference between them and the wages he was previously receiving. In other words, Allman agrees that in view of the respondent having undertaken to pay him 38*s*. a week in the future independently of his employment, he will not expect or be entitled to any further payment from the respondent, so long as he remains in the respondent's employment, beyond the difference between the covenanted payments and the wages he previously received.

Allman has, I understand, remained in the respondent's service and receives in fact the same sum of money weekly from the respondent as he received before the transaction in question. Has that sum to the extent of 38*s*. altered its legal character in consequence of the transaction? In my opinion it has. Whereas previously Allman was entitled to the 38*s*. a week as wages, he is now entitled to payment of this sum weekly whether he is employed by the respondent or not. That is the effect of the deed of covenant. The arrangement embodied in the two collateral documents does not alter that effect, whatever else it does. It is difficult to see how a sum which is payable irrespective of employment can be said to be a profit arising from employment. If the collateral documents had affected the absolute and independent nature of the obligation under the deed of covenant different considerations might have arisen. But the absolute obligation to pay irrespective of employment remains unaffected by the collateral documents, which recognize that Allman will in future have an unqualified right to a weekly payment of 38*s*. from the respondent whether the respondent employs him or not.

My Lords, I venture to suggest that the proper approach to the problem is to ask the question, in the language of Rule 1 applicable to Case III. of Sch. D: Is the 38*s*. a week of the nature of an annual payment payable by the respondent as a personal debt or obligation by virtue of a contract? Plainly it is, and none the less so because of the collateral arrangement which, whatever it does, does not convert the deed of covenant into a contract of employment, for the 38*s*. remains payable, employment or no employment. It is agreed that if Allman leaves the respondent's employment the weekly payments which he will continue to receive under the deed will fall within Rule 1 applicable to Case III. of Sch. D. But the payments made to him while he remains in the respondent's employment are exigible by him under precisely the same legal obligation on the part of the respondent. If then the question which I have put must be answered in the affirmative, Rule 19, sub-s. 1, of the Rules applicable to all Schedules automatically applies and the respondent is entitled to deduct tax on making the covenanted payments to Allman, and if he is entitled to deduct tax from the payments he is also entitled to deduct the amount of these payments in computing his total income for surtax purposes. The same reasoning is applicable to the respondent's transactions with his other employees, except that in the case of Mr. Blow there was only a deed of covenant and no collateral letters. His case is consequently a fortiori of the others.

I am fully conscious of the anomalous consequences which might conceivably arise in other connections from the course adopted by the respondent, but your Lordships are concerned only with the technical question whether the respondent has brought himself within the language of the income tax rule as to contractual payments, and I think that he has succeeded in doing so. That is enough for the decision of the case. It is not likely that many other employers will follow the respondent's example, for few employers would care to take the risk to which the respondent has left himself exposed —namely, that his servants may quit his employment and take their services elsewhere and yet continue to exact the covenanted weekly payments from him.

The result of the views which I have expressed is that in my opinion the appeal should be dismissed and the judgment of the Court of Appeal affirmed.

LORD WRIGHT. The difference of opinion which this appeal has elicited has caused me some doubt, but after careful consideration I am bound to say that, speaking for myself, I have come to the conclusion that the appeal must fail.

If the case were one in which it was found as a fact in regard to each of the deeds in question that it was never intended to operate as a legal document between the parties, but was concocted to cover up the payment of salary or wages and to make these payments masquerade as annuities in order to evade surtax, it may well be that the Court would brush aside the semblance and hold that the payments were not what they seemed. But there is no such finding by the Commissioners; indeed no such case was even suggested; on the contrary, it is admitted that the deeds are genuine and carry an obligation according to their tenour, irrespective of whether the various payees are or are not in the respondent's service at any material date. This is clearly so in the cases not here questioned in which the covenantees are no longer in the respondent's employment. And all your Lordships are of opinion that this is so in the case of Blow, though he is still in the respondent's service, and that the payments in his case are properly deductible.

What then is the difference which distinguishes Blow's case from that of the other covenantees whose cases are to be considered in this appeal? The only difference is to be found in the accompanying letter and form of acknowledgment, both of which are absent in Blow's case. It is on these documents that the Commissioners arrive at their conclusion that the payments under the deeds are not annual payments but "in substance payments for continuing service ejusdem generis with wages or salaries" so long as the recipients remain in the respondent's service.

Like others of your Lordships I shall take as typical the case of Allman. The covenant in the deed to pay him is unconditional. It is not conditioned by the contingency of Allman re-engaging or continuing in the respondent's service; the relevance of that contingency is expressly negatived in the recital; and by clause 3 it is expressly agreed that the payments are to be without prejudice to such remuneration (what that may be is unspecified) as the annuitant will become entitled to in respect of such services, if any, as he may thereafter render to the respondent.

On the footing that the deed is genuine, I do not see any possibility of going behind what appears on the face of the document, or qualifying its effect by documents dehors the deed and in no way embodied in it, or regarding the payments as other than annual payments, as it is admitted that ex facie they are. And what the legal effect is as between the covenantor and the covenantee must determine for revenue purposes the character of the payments actually made.

That character is not to my mind changed if the letter of explanation and the letter of acknowledgment can be taken into account.

The letter of explanation quite correctly, and in accordance with the actual terms of the deed, states that there is nothing to prevent Allman from claiming full remuneration for future work from the respondent ; the letter goes on to state what is expected—namely, that Allman will " in practice be content " with the provision made by the deed with such additional payment as will, with the payments under the deed, bring his salary up to what he had been previously receiving. This seems to me to be merely the language of hope and expectation and not to be language capable of being construed as an offer which, if accepted by Allman, would bind him to work for the respondent at the reduced rate ; that is if in future he did so work, because no one suggests that if he did not work for the respondent his right under the deed would be affected.

But if the letter of explanation, together with the acknowledgment, were treated as constituting a contract, it could only be a contract to pay and accept what may be called the additional sum. I cannot extract from the actual words a promise or right to pay or receive what is called the " full remuneration for future work " ; it is true that Allman would under the deed be entitled to claim " full remuneration " if he were so minded, as a condition of working, but I cannot find any ground for thinking that he ever did so, and still less that the respondent employed him on that footing.

But whatever view is taken, the nature of the obligation embodied in the deed appears to me to be unaffected. I do not stop to examine what is the precise position of Allman and those in like case with him if they go on working in the respondent's employment. It may be that the true inference of fact is that they are working for the additional sum and nothing else, the reason why they are content with this reduced rate being that they are receiving also the annuities under the deed. There may be difficulties in that position. But in any event any such agreement would be merely collateral to the deed.

I may add that I do not understand what is meant by the expression " payments for continuing service ejusdem generis with wages or salaries." The payments must be one thing or the other, either annual payments or wages ; there is no room for anything intermediate or in the nature of cy-près. And once it is admitted that the deed is a genuine document, there is in my opinion no room for the phrase " in substance." Or, more correctly, the true nature of the legal obligation and nothing else is " the substance." I need not develop this point, as I agree with what has been said by my noble and learned friends, Lord Tomlin and Lord Russell of Killowen.

Order appealed from affirmed, and appeal dismissed : Appellants to pay respondent the costs of the appeal.

Lords' Journals, May 7, 1935.

Solicitor for appellants : *The Solicitor of Inland Revenue.*

Solicitors for respondent : *Boodle, Hatfield & Co.*

[HOUSE OF LORDS.]

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May 17.

ROBERT BAIRD, LIMITED, HUNTER'S GARAGE, LIMITED, THE SPRINGFIELD MOTOR COMPANY, HUGH ALEXANDER DORRITY AND CHARLES ERNEST DORRITY, ARMOUR AND MELVIN, LIMITED, CLAUD HAMILTON (MOTORS), LIMITED, AND A. AND D. FRASER } APPELLANTS;

AND

THE CORPORATION OF THE CITY OF GLASGOW . . . . } RESPONDENTS.

By-law — Ultra Vires — Unreasonableness — Uncertainty — Petroleum Filling Stations—Application of Model By-laws—Petroleum (Consolidation) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 32), *s.* 11.

By s. 11, sub-s. 1, of the Petroleum (Consolidation) Act, 1928 (which by s. 24 applies, with certain immaterial modifications, to Scotland) : " For the purpose of preserving for the enjoyment of the public the amenities of any rural scenery or of any place of beauty or historic interest or of any public park or pleasure promenade or of any street or place which is of interest by reason of its picturesque character, the council of any county may make by-laws—(*a*) regulating the appearance of petroleum filling stations; or (*b*) prohibiting the establishment of petroleum filling stations, in any part of their area to which the by-laws apply." . . . .

Purporting to act upon the powers conferred upon them by the above enactment, the Corporation of Glasgow applied to certain areas in the city a set of model by-laws which had been confirmed by the Scottish Office and approved by the Secretary of State. The areas affected by the by-laws formed a belt round the centre of the city and covered a surface of 35 square miles. Certain motor traders and suppliers of petroleum, feeling themselves aggrieved by the extent of the area and the restrictions in relation to the filling stations, claimed a decree reducing the by-laws on the ground that they were ultra vires, unreasonable, and uncertain:—

Held, that the Act left to the Corporation the power of determining to what part of their area by-laws should be made to apply in order to preserve the amenity of the places mentioned in s. 11; that they were the judges of the beauty or picturesque character of the places; and that the by laws were not ultra vires or unreasonable or uncertain.

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* *Present:* LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD ALNESS.

Interlocutor of the First Division of the Court of Session affirmed.

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Appeal from an interlocutor of the First Division of the Court of Session.

The appellants, pursuers in the Court of first instance, were several companies and firms of motor engineers and garage proprietors carrying on business in Glasgow—namely, Robert Baird, Ld., Hunter's Garage, Ld., The Springfield Motor Company, H. A. and C. E. Dorrity, Armour & Melvin Ld., Claud Hamilton (Motors), Ld., and A. & D. Fraser.

The defenders were the Corporation of the City of Glasgow.

Purporting to act under the powers conferred upon them by s. 11 of the Petroleum (Consolidation) Act, 1928 (1), the defenders made, with a view to regulating petroleum filling stations, certain by-laws, which were afterwards confirmed by the Secretary of State under sub-s. 3 of that section.

It was not disputed that the procedure adopted by the defenders in promulgating these by-laws was in all respects regular and in accordance with the statutory provisions.

(1) Petroleum (Consolidation) Act, 1928, s. 11, sub-s. 1: "For the purpose of preserving for the enjoyment of the public the amenities of any rural scenery or of any place of beauty or historic interest or of any public park or pleasure promenade or of any street or place which is of interest by reason of its picturesque character, the council of any county or borough may make by-laws—

(*a*) regulating the appearance of petroleum filling stations; or

(*b*) prohibiting the establishment of petroleum filling stations,

in any part of their area to which the by-laws apply; and, without prejudice to the generality of the foregoing provisions, any such by-laws regulating the appearance of petroleum stations may, in particular, require compliance with such provisions as may be contained in the by-laws as to the position, design, size, colour and screening of such stations or of any parts thereof." . . . .

Sub-s. 2: "Any part of the area of a council to which by-laws or a draft of any by-laws made under this section apply shall be distinctly marked and shown on plans to be signed by and deposited with the clerk of the council making the by-laws, and the said plans shall be at all reasonable times thereafter open for the

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The following were among the by-laws so made by the defenders :—

" 1. The by-laws shall apply to the areas of the city coloured or hatched blue on the deposited maps.

2. The following provisions shall have effect with respect to every filling station within the areas aforesaid, that is to say :—

(1.) Except in so far as is permitted by the First Schedule to these by-laws :—

(*a*) No visible advertisement, name or lettering used in or in connection with a filling station shall be exhibited within the areas aforesaid ;

(*b*) All visible apparatus comprised in a filling station shall, if painted or otherwise coloured, be of the same colour ;

(2.) Every visible wall forming part of a filling station shall be constructed of or faced with

(i) bricks, either of facing quality or salt glazed ; or

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inspection of the public without charge."

Sub-s. 3 : " No by-laws made under this section shall come into force until confirmed by the Secretary of State, and before submitting any such by-laws to the Secretary of State the council by whom the by-laws were made shall, in such manner as may be directed by the Secretary of State, publish a draft thereof, together with notice of the place where the plans marked in accordance with the provisions of this section may be inspected and of the intention of the council to apply for the confirmation of the by-laws."

In sub-s. 6 there are provisions for the recovery of penalties from any person who infringes the by-laws.

Sect. 23 : " In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them (that is to say) :—

'Amenities,' in relation to any place, includes any view of or from that place : . . . .

'Motor vehicles' includes all mechanically-propelled vehicles intended or adapted for use on roads :

'Petroleum' includes crude petroleum, oil made from petroleum, or from coal, shale, peat or other bitumenous substances, and other products of petroleum :

'Petroleum filling station' means any premises or place used or intended to be used by way of trade or for purposes of gain for fuelling motor vehicles with petroleum, and includes any building, advertisement, pump or other apparatus in, or used in connection with, any such premises."

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(ii) clay tile or natural slate hanging; or
(iii) natural or artificial stone or terra cotta; or
(iv) roughcast; or
(v) cement rendering; or
(vi) concrete blocks.

(3.) Every visible roof forming part of a filling station shall be covered with natural slates, clay tiles, lead, copper or asbestos slates, russet brown with square corners and laid as ordinary slating;

(4.) Any visible corrugated or galvanized iron which was used in or in connection with a filling station before these by-laws came into force shall be painted, and no other visible corrugated or galvanized iron shall be used in or in connection with the station;

(5.) No visible lamp giving intermittent illumination used in or in connection with a filling station shall be exhibited in the areas aforesaid;

(6.) The filling station shall be kept in a tidy and orderly condition to the satisfaction of the chief officer of the Corporation under the Act."

The areas of the city "coloured or hatched blue on the deposited maps," that is to say the area subject to the by-laws in question, covered practically the whole of the city except the central portion, a considerable district north of the Clyde, and a smaller portion to the south of the river. The excepted portion was almost entirely built over. The by-law area was about 35 square miles in extent, and large portions of this area were devoted to industrial, commercial, and residential purposes, or to tenement holdings, and possessed none of the amenities mentioned in s. 11, sub-s. 1, of the Act under which the by-laws purported to be made.

The pursuers brought an action for declarator, or a declaration, that the by-laws were ultra vires, unreasonable, and bad for uncertainty, and that they were illegal and of no force or effect. The Lord Ordinary (Lord Fleming) pronounced an interlocutor in favour of the pursuers. The defenders presented a reclaiming note to the First Division of the Court of Session. On February 22, 1934, the First Division (The

Lord President (Lord Clyde), Lord Sands (1), Lord Blackburn and Lord Morison) recalled the interlocutor of the Lord Ordinary, declared that the by-laws were intra vires and assoilzied the defenders.

The pursuers appealed to this House.

May 16. *James Keith K.C.* and *R. P. Morison* for the appellants.

1. These by-laws are ultra vires. Sect. 11 of the Petroleum Act, 1928, empowers the respondents to make by-laws for the purpose of preserving for the enjoyment of the public the amenities of any rural scenery or of any place of beauty or historic interest or of any public park or pleasure promenade or of any street or place which is of interest by reason of its picturesque character. Let it be granted that here and there within the 35 square miles to which the respondents' by-laws purport to apply there are places of beauty or historic interest, public parks or pleasure promenades, and streets of picturesque character; yet surely that does not warrant the respondents in placing the whole 35 square miles under the ban of their by-laws. Large portions of this area are devoted to industrial purposes and to tenement property, yet no petrol pump of a design other than one permitted by the by-laws may be erected within these portions. This is an unjustifiable interference with the trade and business of the appellants and with their reasonable methods of advertisement, and the by-laws are unreasonable. In truth the respondents have made their by-laws, not with an eye to the object and intention of the Act, but with a view to a town planning and housing scheme which they have in contemplation.

2. The by-laws are void for uncertainty. Opinions may vary concerning the beauty or the picturesque character of a place; yet the by-laws offer no criterion by which to judge of this question. Then take for example by-law: 2 "No

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(1) Lord Sands was not present at advising but had expressed to the Lord President his agreement with the opinion of the Court as a whole.

visible advertisement shall be exhibited " . . . . ; " All visible apparatus . . . . shall be of the same colour " ; and the same word " visible " is used to qualify the substantives wall, roof, corrugated iron, and lamp. But the point of view from which these objects are supposed to be visible is no-where expressed or implied. There is ample ground for supporting the interlocutor of the Lord Ordinary, and in a case like the present, consisting of matter of fact and inference from facts, his opinion ought not to be overruled unless he has applied some erroneous principle of law.

Graham Robertson K.C., *Sir Matthew Fraser K.C.*, and *J. L. Clyde* for the respondents were not called on.

The House took time for consideration.

May 17. LORD TOMLIN. This is an appeal from an interlocutor of the First Division of the Court of Session recalling an interlocutor of the Lord Ordinary in an action raised by the appellants, who are certain motor traders in the City of Glasgow, against the respondents, who are the Corporation of the city. The appellants sought in the action a declarator to the effect that certain by-laws made by the respondents under s. 11 of the Petroleum (Consolidation) Act, 1928, were bad, as being unreasonable or uncertain, or, alternatively, as being ultra vires. The Lord Ordinary held that the by-laws in question were not bad for unreasonableness or uncertainty, but he held them to be ultra vires. On appeal the First Division agreed with the Lord Ordinary that the by-laws were not bad for unreasonableness or uncertainty, but they differed from him on the question of ultra vires, and held that the by-laws were intra vires and good.

[His Lordship, after reading s. 11, sub-ss. 1, 2, and 3, and referring to sub-s. 6, proceeded :] Sect. 23 of the Act contains some definitions, and amongst others it defines " Amenities " in this way : " ' Amenities,' in relation to any place, includes any view of or from that place." " Petroleum filling station " is defined as meaning " any premises or place used or intended to be used by way of trade or for purposes of gain for fuelling

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motor vehicles with petroleum, and includes any building, advertisement, pump or other apparatus in, or used in connection with, any such premises." "Petroleum" is also defined as including "crude petroleum, oil made from petroleum, or from coal, shale, peat or other bituminous substances, and other products of petroleum."

The Act of 1928 in s. 11 reproduces a section of an earlier Act, and in connection with the provisions of that earlier section a Departmental Committee sat and made a report by which certain model by-laws were recommended. That model form of by-laws was subsequently, with some minor modifications, adopted and approved by the Scottish Office as appropriate for use by the authorities in Scotland exercising the powers conferred by the Act.

The respondents having had their attention called by a letter from the Secretary of State to the advisability of considering whether they should exercise the powers of s. 11 in regard to any part of their city, referred the matter to a sub-committee, which obtained a report from the three officers of the respondents most closely concerned with the matter—namely, the Master of Works, the Director of Housing, and the Petroleum Inspector. Those officers reported to the sub-committee, and their report was against any by-law for the total prohibition of petroleum filling stations in any part of the city, but they recommended by-laws for regulating the appearance of petroleum filling stations in certain specified areas. That report appears to have been adopted by the sub-committee, and ultimately the recommendations of the report were approved by the Corporation, and certain by-laws were in due course framed and adopted and the proper steps were taken to bring them into operation, and they were ultimately confirmed by the Secretary of State in accordance with the provisions of the section. The by-laws which were adopted were the model by-laws which had been approved by the Scottish Office, with certain minor modifications.

Those by-laws are expressed, in the first by-law, to apply "to the areas of the city coloured or hatched blue on the deposited maps." I will, in a moment, indicate what those

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areas were. The second by-law is as follows: " The following provisions shall have effect with respect to every filling station within the areas aforesaid, that is to say:—(1.) Except in so far as is permitted by the First Schedule to these bye-laws: (*a*) No visible advertisement, name or lettering used in or in connection with a filling station shall be exhibited within the areas aforesaid; (*b*) all visible apparatus comprised in a filling station shall, if painted or otherwise coloured, be of the same colour. (2.) Every visible wall forming part of a filling station shall be constructed of or faced with "—and then a number of materials are indicated. Provision (3.) is: " Every visible roof forming part of a filling station shall be covered with natural slates, clay tiles "—and other substances mentioned.

Provision (4.) deals with visible corrugated or galvanized iron, and states that it shall be painted. Provision (5.) provides that " no visible lamp giving intermittent illumination used in or in connection with a filling station shall be exhibited in the areas aforesaid," and by provision (6.) it is provided that " the filling station shall be kept in a tidy and orderly condition to the satisfaction of the Chief Officer of the Corporation under the Act."

Under by-law 3 the occupier of any filling station established at the time of the making of the by-laws is for two years made exempt from the operation of so much of the by-laws as requires any structural alteration of the filling station.

By-law 4 applies the Interpretation Act and also contains certain definitions. It defines " deposited maps "; it defines " filling station " as meaning a petroleum filling station; and it defines " standard sign " as meaning a " sign conforming to the diagram and description set out in the Second Schedule to these by-laws."

Then the First Schedule, which contains the permitted deviations from the requirements of by-law No. 2, states: " The name of any filling station and of the occupier thereof may be displayed therein once, in a position not higher than the level of the lowest part of any roof, by means of letters not exceeding twelve inches in height." There is also a provision permitting the occupier of a filling station to display a sign of any motoring club or association which the occupier of the filling station is authorized to display. There is a provision with regard to signs which may be exhibited for indicating the brand of fuel or oil supplied from any pump or container. There is then a provision for the display of a standard sign " in not more than three positions in or in connection with any filling station." The Second Schedule contains in Part I. a diagram of the standard sign, and in Part II. a description of the sign. That sign contains spaces in which certain things may be placed, some spaces with movable panels, and some with fixed panels.

It is to be noticed in connection with these by-laws—because this is relevant to a point which has been made before your Lordships—that the word " visible " applied in the second by-law to advertisements, apparatus, walls, roofs, corrugated or galvanized iron and lamps, has not been anywhere actually defined.

Now the areas to which those by-laws have been applied are considerable areas forming, in effect, a continuous belt round the central part of the city of Glasgow, and they are said to contain in all about 35½ square miles. It is not disputed that they contain within themselves examples of the objects and places which are referred to in s. 11 of the Act of 1928. There are to be found in each of them rural scenery, places of beauty or historic interest, public parks, pleasure promenades, and streets or places which are of interest by reason of their picturesque character. There may be considerable difference of opinion as to a number of those objects and places. There will be, no doubt, a difference of opinion as to whether some of them fall within the description of the section or whether they do not, but at any rate there are a considerable number of them present in each of the areas.

Upon the question of ultra vires, which is the main question in the case, it is said, however, that inasmuch as the areas include spots or tracts which cannot, it is said, be brought within any of the descriptions contained in s. 11, therefore the inclusion of them in the areas is in itself improper and

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outside the powers of the Corporation, and that the effect of that is to make the whole of the by-laws applied to those areas, improperly (as is alleged) including those places, bad and of no effect.

It is necessary, of course, for any Court adjudicating upon this question, first of all to consider the meaning of the statutory power which the Corporation are affecting to exercise by making the by-laws; and, secondly, to consider the by-laws themselves and to determine whether, when examined, they contain any excess of the power as interpreted. That is the nature of the problem.

Looking at the Act itself there are one or two matters which your Lordships may think are reasonably plain. The first is that although the purpose of the section is "the purpose of preserving for the enjoyment of the public the amenities" of certain things, the power of the authority is to make by-laws in relation to the matters mentioned (that is, in this case "regulating the appearance of petroleum filling stations") "in any part of their area to which the by-laws apply." That must mean, to which in the judgment of the Council the by-laws should be made to apply. In other words, it rests with the judgment of the Council to determine what is the part of their area to which the by-laws should be made to apply in order to preserve the amenities of the things mentioned by the section which are found within their area. The moment that construction of the section is adopted it is plain that the area to which the by-laws apply is not an area which is limited by the site of the places or objects which are mentioned in the section; it must be an area which in the judgment of the Council is an area proper to be made subject to the by-laws in order to preserve for the enjoyment of the public the amenities of the things which are found in the area.

The next matter which may be mentioned is that many of the things described in the section are things in regard to which a judgment of some kind is necessary; for example, "any street or place which is of interest by reason of its picturesque character." I apprehend that the "picturesque character" of any street or place is a matter upon which there may well be differences of opinion. The Act provides no standard by which it is to be judged, and it is an inevitable conclusion upon that construction of the section that it is the Council alone on whose judgment a matter of that sort must rest where the Council is exercising the powers of the section.

Again, it has been suggested that the word "place" has a narrow meaning and must be confined to some spot which forms the site of a particular building, park, or other object, whereas in fact there seems no reason as a matter of language why "place" should not be of much wider significance and why a "place which is of interest by reason of its picturesque character" should not include in certain circumstances a very considerable area of country. Bearing these matters in mind, on the face of the by-laws which have been made, regarded with the deposited maps, there seems prima facie no reason on which there can be based a suggestion that the by-laws are in excess of the powers of the section.

But the appellants before your Lordships have attacked the by-laws in this way. They have said: "Oh, but the officials of the Corporation who prepared the original report seem to have had in their minds much more the protection of the areas which were affected by the Corporation's town-planning and housing schemes than anything else," and it is suggested that because those areas are included in the area subjected to the by-laws there is some ground for saying that the areas have been improperly selected. The whole argument, I think, is based on some confusion of thought, because there are two things which are quite distinct. The Corporation has not been attacked on the ground that it has made a mala fide use of the powers of the section. It is not said that the Corporation wanted to do one thing and, under cover of the Act without exercising any discretion under the Act, have proceeded to do that which they wished to do, which was something outside the Act. That is not said of them. All that is said is that they have exceeded their powers. Approaching the matter in that way it seems to me irrelevant to take into account what was in the minds of the various officers before whom the matter came in the course of its consideration, before the Council themselves resolved upon the adoption of the by-laws, because the only question here is excess or non-excess, and the motives of those who took part in the consideration of it, even if they were as alleged, seem to me to be irrelevant.

But it is said that, apart from that, inasmuch as these districts contain the site of industrial works and other places which cannot be brought within the categories mentioned in s. 11, therefore the application of the by-laws to a district which contains them must necessarily be bad. It seems to me that when once the construction of the section which I have suggested to your Lordships is approved that argument must fail.

For these reasons, I am of opinion that the attack on the by-laws as being ultra vires cannot be sustained, and that in that regard the appeal fails.

There remains the question of unreasonableness and uncertainty. Upon the question of unreasonableness it is said that the opportunities of indicating what the trader does and for whom he acts as agent, and the nature of the services which he is prepared to render, are inadequate. Those are matters, no doubt, which might have been placed before those whose duty it was to consider whether the by-laws should be adopted, or those whose duty it was to consider whether the by-laws should be confirmed; but they can be of no avail at this time, and in this place, to support a plea of unreasonableness. Unreasonableness in regard to by-laws of this kind is something which can never be made out except upon a case of great strength and clearness. These particular by-laws are in effect in a form recommended by a Departmental Committee, approved by the Scottish Office, and ultimately adopted by the Corporation at the suggestion of the Secretary of State. Those are in themselves no grounds, of course, for saying that they cannot be unreasonable, but they are some grounds for saying that any case of unreasonableness which is made against them must be made with the ultmost clearness.

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I think that the Courts below were right in holding that unreasonableness was not made out.

That leaves only the question of uncertainty, and uncertainty has been based really upon the single word "visible." It is said that there is no definition of "visible," that nobody can tell what "visible" means, that inasmuch as these by-laws lead to penalties the trader is entitled to know clearly what he can do and what he cannot do, and that when he reads these by-laws and sees that "no visible advertisement . . . . shall be exhibited within the areas aforesaid," he does not know what "visible" means. If it fell to me to-day to construe these by-laws I should feel no difficulty in construing the word "visible." It seems to me that the meaning is plain enough. Having regard to what the by-laws are, and what is the Act to which they are giving effect, "visible" plainly means visible from the outside, and I think there can be no effective argument of uncertainty based on that word. If that is right, there is nothing else to found uncertainty on, and that plea, like the other plea, must fail.

In my opinion the appeal wholly fails, and I invite your Lordships to dismiss it with the usual consequences.

LORD THANKERTON. I entirely concur with the reasons which have been expressed by my noble and learned friend on the Woolsack for dismissing this appeal, and I have nothing to add.

LORD MACMILLAN. I also agree, and cannot make any useful addition.

LORD WRIGHT. I likewise concur.

LORD ALNESS. I also agree.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, May 17, 1935.

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v.
CITY OF GLASGOW.

Solicitors for appellants: *Slaughter & May, for Shepherd & Wedderburn, W.S., Edinburgh.*

Solicitors for respondents: *Martin & Co., for Campbell, Smith Mathison & Oliphant, Edinburgh, and David Stenhouse, Town Clerk, Glasgow.*

[HOUSE OF LORDS.]

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1935
June 21.

PENMAN . . . . APPELLANT;

AND

THE FIFE COAL COMPANY, LIMITED RESPONDENTS.

Master and Servant—Deductions from Wages—Arrears of Rent—House owned by Employers—Workman's Father Tenant—Father formerly in same employment—Claim to recover Deductions—Mora and Acquiescence—Truck Act, 1831 (1 *&* 2 *Wm.* 4, *c.* 37), *ss.* 2, 3, 4, 23—*Truck Act,* 1887 (50 *&* 51 *Vict. c.* 46), *s.* 6.

The appellant was an oncost workman in the respondents' colliery. His father had been in the respondents' employment and was tenant of a house owned by them. The father ceased to be employed by the respondents, but remained tenant of the house, in which he lived with his family including the appellant. The father failed to pay the rent for the house, and the respondents deducted the rent from the appellant's wages, the appellant signing a written consent to the deduction in order to save the family from eviction. The appellant brought an action to recover sums amounting to 37*l.* 15*s.* 4*d.*, which he alleged were illegally deducted:—

Held, that he was entitled to recover the sum claimed as the deductions were illegal, null and void under ss. 2 and 3 of the Truck Act, 1831.

Hewlett v. *Allen* [1894] A. C. 383 distinguished.

Interlocutor of the Second Division of the Court of Session 1934 S. C. 254 reversed.

APPEAL from an interlocutor of the Second Division of the Court of Session. (1)

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(1) 1934 S. C. 254.

* *Present*: LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD ALNESS.

The appellant, pursuer in the Court of first instance, was a youth of the age of sixteen. He lived with his father, John C. Penman, a miner, at 8 Beaumont Street, Low Valleyfield, Newmills, in the county of Fife, his curator and administrator in law. He was himself an oncost worker in the Valleyfield Colliery of the defenders, a company registered under the Companies Acts and carrying on the business of coal masters at their registered office in Leven.

The pursuer's father had been for many years in the defenders' employment and in occupation, as tenant and occupier, of No. 8 Beaumont Street aforesaid under and by virtue of his employment with the defenders, who were the owners thereof.

On May 5, 1931, the pursuer's father left the defenders' employment and made a claim for compensation in respect of an alleged accident sustained by him on that day. The claim was settled in January, 1932, by a payment of 10*l.* He was unemployed since May 5, 1931, but he continued to occupy the house, 8 Beaumont Street, with his family, including the pursuer.

A few weeks after May 5, 1931, the pursuer lost his employment underground, but in June he got work at the picking tables where he had since been employed. From that time forth the defenders deducted from his wages the rent of the house occupied by his father, himself, and the other members of the family.

The pursuer and his father from the first and frequently protested against these deductions and asked for payment of what had been deducted. The defenders' cashier explained that unless the deductions were allowed proceedings would be taken to evict the pursuer's father for non-payment of rent. The pursuer then allowed the deductions to be made and signed his pay ticket until the end of February or beginning of March, 1933. The pay ticket was in two parts, the upper part contained particulars of the amount paid, and was retained by the workman; the lower part, or counterfoil, was signed by the pursuer and retained by the defenders. It was in this form: "Received the sum of

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£ , being payment in full of all wages due to me up to this date, subject to the saving clause in Rule III. of the conditions of employment.

"And I hereby authorize you to deduct from my wages in future so long as I am in your employment the amounts due for house rent, rates, gas, water, and chimney sweeping, the customary charges for medicine and medical attendance, and for lamps and tool sharpening; also any cash advanced, and the price of coals (including carriage), railway tickets, materials, tools, or implements, with which you may supply me. Signed Alexander Penman."

The pursuer claimed that during the period of his father's unemployment the defenders deducted from the pursuer's wages a weekly sum to cover rent and rates due from his father; that these deductions were unwarrantable, being illegal, null and void under the Truck Acts; and that they amounted to 37*l.* 15*s.* 4*d.*, for which sum he brought the action.

At the hearing before the Sheriff-Substitute of the Sheriffdom of Fife and Kinross, at Dunfermline, a letter was produced dated March 1, 1932, from the defenders' agents to the pursuer's agent. It set forth the defenders' position, which was that it had been explained to the pursuer's father on June 29, 1931, that, unless he took steps to pay the current rent and arrears, proceedings in ejectment would be taken against him; that an arrangement had then been made whereby rent and rates were to be deducted from the wages of the pursuer; that each week the pursuer had signed his pay ticket without taking exception to the deductions; that he had also received the privilege, given only to householders who are paying their rent, of a supply of coal at a special rate; and that, if exception was taken to the deductions, the defenders would institute proceedings against the pursuer's father. After this letter nothing was done until the present action was brought in February, 1933.

The Sheriff-Substitute held that the contract, if any, to allow the defenders to make the deductions, and also the deductions which were made, were "illegal, null and void"

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within ss. 1, 2 and 3 of the Truck Act, 1831. (1) In so holding he purported to follow *M'Farlane* v. *Birrell* (2); *Summerlee Iron Co.* v. *Thomson* (3), and *Williams* v. *North's Navigation Collieries* (1889) *Ld.* (4) He further held that s. 23 did not

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(1) Truck Act, 1831, s. 2: "If in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void."

Sect. 3: "The entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void."

Sect. 4: .... "Every artificer .... shall be entitled to recover from his employer .... in the manner by law provided for the recovery of servants wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer .... as shall not have been actually paid to him by such his employer in the current coin of this realm."

[The trades to which the Act applies are enumerated in s. 19, and include occupation in mines.]

Sect. 23: "Nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer .... from demising to any artificer .... the whole or any part of any tenement at any rent to be thereon reserved; .... nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent; .... Provided always, that such stoppage or deduction .... shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer."

Truck Amendment Act, 1887, s. 6: "No employer shall, directly or indirectly, by himself or his agent, impose as a condition, express or implied, in or for the employment of any workman any terms as to the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid to the workman are or is to be expended, and no employer shall by himself or his agent dismiss any workman from his employment for or on account of the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid by the employer to such workman are or is expended or fail to be expended."

(2) (1888) 16 R. (J.) 28.

(3) 1913 S. C. (J.) 34.

(4) [1906] A. C. 136.

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operate to justify the deductions, because the rent in respect of which they were made was due, not from the pursuer, but from his father; and that the allowance in the price of coal was immaterial. He therefore held that the wages, having been earned and not paid, must be paid, and he decerned in favour of the pursuer for payment of 37*l.* 2*s.* 7*d.* and costs on the lower scale.

On an appeal by the defenders the Sheriff recalled the interlocutor of the Sheriff-Substitute on the ground that the pursuer was barred by acquiescence and mora from recovering the sum sued for.

The pursuer appealed to the Second Division of the Court of Session. The Court by a majority (Lord Hunter, Lord Anderson, and Lord Murray, the Lord Justice–Clerk (Aitchison) dissenting), dismissed the appeal.

The pursuer then appealed to this House.

May 17. *R. Gibson K.C.*, *T. J. D. Connolly* and *Michael Marcus* for the appellant. The object and intention of the Truck Acts is to ensure that a workman shall be paid his wages in full: s. 3 of the Act of 1831; and that, except in so far as he is empowered by statute, he shall not be able to contract as to the manner in which his wages, when paid, shall be expended: s. 6 of the Act of 1887. It is true that in *Hewlett* v. *Allen* (1), where one of the terms of the appellant's employment was that she should make weekly payments to a sick and accident club, and her employer, the respondent, with her consent paid her each week the amount of her wages less the payments due to the club, this House, affirming the decision of the Court of Appeal (2), held that the wages due had been paid in current coin of the realm within the meaning of s. 3 of the Act. In *Williams* v. *North's Navigation Collieries* (1889) *Ld.* (3), where there was no consent of the workman to the application of his wages, it was held that the deductions made by the employer could not be justified. *Hewlett* v. *Allen* (1) went to the extreme point in favour

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(1) [1894] A. C. 383.
(2) [1892] 2 Q. B. 662.
(3) [1906] A. C. 136.

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of the respondents, and would only be followed in a case on all fours with it. The present case is distinguishable in several important matters: (1.) the money deducted from the appellant was not due from him but from his father; (2.) the money deducted was not due to a third party, but was due to the respondents themselves. The deductions cannot be justified under s. 23 of the Act of 1831, because the house is not and never was demised to the appellant. Nor is this a case where the claim of the appellant can be met by a defence of set off, because no debt is due from the appellant, or of accord and satisfaction, because any such agreement would be null and void by force of ss. 1 and 2. The result is a clear cause of action by the appellant, and no defence available to the respondents.

May 20. *Graham Robertson K.C.* and *John Cameron,* with them *A. M. Wallace* of the English Bar, for the respondents. This case is outside the mischief hit at by the Truck Acts. The principle upon which that legislation is based is that the workman requires protection, that if not protected he may be over-reached. It is quite consistent with that principle that in any action brought by him to recover his wages he may be liable to have the sum found on investigation to be due to him diminished by the sum found to be due by him: see per Lord Atkinson in *Williams* v. *North's Navigation Collieries* (1889) *Ld.* (1) A payment made by an employer at the instance of a person employed to place money in the hands of some person in whose hands the person employed desires it to be placed is a payment to the person employed as much as if the current coin of the realm had been placed in his hands: *Hewlett* v. *Allen* (2), per Lord Herschell. The respondents rely on the words of Lord Hunter in the Court below (3): "I think . . . . that the arrangement made" [between the parties] "may fairly be held as amounting to a mandate by the pursuer to the defenders to allocate part of his wages in payment of the rent due by his father. It was gratuitous, and might be recalled at any time. In reality

(1) [1906] A. C. 136, 146.
(2) [1894] A. C. 383, 389.
(3) 1934 S. C. 254, 261.

what was done was a voluntary employment by the pursuer of his wages, or part of his wages. If the pursuer had authorized his father to receive his wages or part thereof, and his father on receiving the wages had paid the defenders, apparently the case would have come within the situation figured by Lord Herschell. (1) The mere fact that this procedure was not followed is, in my opinion, an insufficient reason for holding the arrangement illegal."

The Sheriff-Substitute has found that the appellant assented to the deductions made from his wages and to the application of the deductions for the purpose of paying his father's rent. He himself has had the benefit of his father's tenancy. Now he desires, having accepted the benefit, to discharge himself of the burden. In this case it is the employers and not the workman for whom protection is desirable; and if there is any over-reaching they are the victims, and not he.

Counsel for the appellants were not called on to reply.

The House took time for consideration.

June 21. LORD THANKERTON. My Lords, I have had the privilege of reading the opinion which is about to be delivered by my noble and learned friend, Lord Macmillan, in which I entirely concur.

LORD MACMILLAN. My Lords, I am authorized by my noble and learned friend, Lord Tomlin, who is unable to be present, to say that he concurs in the opinion which I am about to read.

The questions affecting the scope and effect of the Truck Act, 1831, which are raised in this appeal, have given rise to considerable divergencies of opinion in the course of the progress of the case through three Courts of Scotland to this House.

The facts are set out in the interlocutor of the Second Division of the Court of Session now under appeal. The cause having originated in the Sheriff Court, the judgment

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(1) [1894] A. C. 383, 389.

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of the Court of Session, in so far as it relates to the facts, has "the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor." It is only in so far as the judgment "depends on or is affected by matter of law" that it is open to review in your Lordships' House (6 Geo. 4, c. 120, s. 40). (1)

It appears that between June, 1931, and January, 1933, the appellant, who was then and is still in minority, was in the employment of the respondents as an oncost worker in their collieries. During the period in question the respondents deducted from the weekly wages earned by the appellant the rent payable to them by the appellant's father as occupier of a house belonging to the respondents, and a proportional sum in name of rates. The appellant's father had formerly been in the employment of the respondents but had ceased to be so before the material period, during the whole of which he was unemployed. While he was in the respondents' employment he occupied one of the houses provided by them for their workmen, and after he ceased to be in their employment he was allowed to continue to occupy it. The sums deducted by the respondents from the appellant's wages for rent in respect of his father's occupancy of the house were retained by the respondents in payment of the father's rent. It is expressly found that the appellant "assented to the deductions so made from the wages earned by him and to application of said deductions for said purpose." It is further found that in respect of the appellant's "assent to said deductions and application of wages" the respondents refrained from taking proceedings for the eviction of his father and himself from the respondents' house and also supplied house coal to the appellant "at the special cheap rate granted by them to workmen in their employment who were paying rents under contracts of let."

The action is a simple petitory action for a sum of money representing the deductions which were made from the appellant's wages and which are now agreed to amount to 37*l.* 2*s.* 11*d.* The sum is sued for as representing the "balance

(1) The Court of Session Act, 1825.

of his wages" on the plea that the deductions in question were "illegal under the Truck Act." The Sheriff-Substitute held that the deductions were illegal, null, and void, and that the appellant was entitled to recover the amount thereof as wages earned but unpaid. The Sheriff on appeal, while agreeing with the Sheriff-Substitute that the deductions were illegal, nevertheless found in law that the appellant was "barred by acquiescence and *mora* from recovering the sum sued for." In the Court of Session the Second Division found in law that "the deductions made from the [appellant's] wages and the application thereof and any arrangement or contract relating to said deductions or their application were not illegal, null, and void under the Truck Acts," and accordingly assoilzied the respondents. The Lord Justice-Clerk (Aitchison) dissented, holding that the deductions were struck at by the statute, and that the appellant was not barred from recovering the amount thereof.

There are two questions to be decided. First, whether the deductions made from the appellant's wages were in contravention of the statute; second, if so, whether the appellant is barred from recovering them.

1. On the first question the words of s. 3 of the Truck Act, 1831, are clear. "The *entire amount* of the wages earned by or payable to any artificer" to whom the Act applies "in respect of any labour by him shall be *actually paid to such artificer* in current coin of this realm." I underline the emphatic words "entire amount" and "actually paid to such artificer." As Lord Bowen, when Lord Justice, said in *Hewlett* v. *Allen* (1): "The statute insists (in all but the excepted cases) on actual payment in coin. Payment in account will not do. Payment in goods will not do. Nothing is to discharge the wages debt except actual payment in current coin." In the present case the appellant is an artificer to whom the Act applies and the deductions challenged do not fall within any of the permissible exceptions set out in s. 33. On the facts as found nothing can be more certain than that the entire amount of the wages earned by

(1) [1892] 2 Q. B. 662, 666.

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the appellant was not actually paid to him in current coin. A part of the wages earned by him was not paid to him at all, in current coin or otherwise; it was deducted by the respondents from the sum payable to him and applied by them in discharge of the rent due to them by the appellant's father. So far as the deductions are concerned there was no payment in current coin or at all. No coin passed from one hand to another. On this part of the case it seems to me quite immaterial that the deductions were assented to by the appellant. The statute is none the less contravened by reason of the fact that the appellant has assented to the contravention. Were it otherwise, what Bowen L.J. describes as the "tutelary shelter" of the statute would afford but a sorry protection.

From this apparently unanswerable reasoning the respondents seek to extricate themselves by invoking the interpretation which they represent as having been placed upon the language of the statute by this House in *Hewlett* v. *Allen*. (1) In that case the workwoman on entering her employment signed an agreement undertaking to conform to the rules of her employers' works, one of which rules required all employees to become members of a sickness and accident club. The rules of this benefit club in turn required its members to contribute a weekly subscription to its funds. The employers when paying the workwoman her wages deducted every week her subscription to the club and paid it over to the club treasurer, who banked it. The workwoman, after leaving the employment of the firm, sued them for the amount of the deductions so made from her wages. It was held in the Court of Appeal that the deductions were in contravention of the statute, but in this House it was held that there had been no contravention. The following quotations will show the process of reasoning by which this result was reached. Lord Herschell L.C. (2) said: "I can myself entertain no doubt that a payment made by an employer at the instance of a person employed to discharge some obligation of the person employed, or to place the money in the hands of some person in whose hands the person employed desires it to be placed, is in the sense and meaning of those sections a payment to the person employed as much as if the current coin of the realm had been placed in his or her hands." And again (1): "The question, then, is whether, in the present case, it is established that the total wages of the plaintiff have been paid, either by handing them to her in the current coin of the realm or by making on her behalf payments which she has authorized. I cannot doubt that, on the true view of the circumstances of this case, it has been established that the employer has thus discharged himself, and unless there are provisions in the Truck Act which prevent the inferences being drawn which otherwise would be drawn, the conclusion is absolutely irresistible." His Lordship found no such provisions in the statute. Lord Watson (2) thought that the House should "hold that the contributions advanced by the respondent firm, on behalf of the appellant, were substantially equivalent to payments made by them to the appellant herself, in current coin within the meaning of the Act." Lord Shand said (3): "I think that a payment made presumably, as and when wages have become due, at the request or on the mandate of one of the persons employed, to meet an obligation or for a purpose which he or she desires to fulfil is a payment which is not invalid as being struck at by the requirements of the statute."

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(1) [1894] A. C. 383.

(2) Ibid. 389.

I have made these full quotations in order to exhibit quite clearly the principle upon which their Lordships proceeded—namely, that a debtor discharges his debt to his creditor when he pays the creditor's creditor on his creditor's instructions. I cannot refrain from observing that the statutory requirement that there shall be, not only payment, but payment in current coin, seems to have been held satisfied without any evidence of current coin having actually passed between any persons; but, be that as it may, the decision must of course be accepted as binding in all cases where the facts are the same.

(1) [1894] A. C. 392.
(2) Ibid. 394.
(3) Ibid. 398.

The facts, however, in the case now under your Lordships' consideration are not the same, and the difference goes to the root of the matter. Here there was no payment at all, whether in current coin or otherwise, by the respondents to any one. The respondents simply retained part of what they were bound to pay, and applied what they retained in discharge of the liability of the appellant's father. No doubt it may be said in popular parlance that they paid themselves. But I cannot think that this was payment in current coin to the workman within the meaning of the statute. I adopt the words of Bowen L.J. in *Hewlett's* case (1), where he said: "The employer cannot, for the purpose of compliance with the statute, be both payer and payee. To hold otherwise would be to make the statute idle." Nothing that was said in this House detracted from the soundness of this view, which was subsequently referred to with approval by Lord Davey in *Williams* v. *North's Navigation Collieries* (1889) *Ld.* (2) In *Hewlett's* case (3) the payment which was upheld was payment by the employers to a third party. The employers themselves derived no personal benefit. In the present case the retention was for the employers' own benefit, and it is a cardinal object of the Truck Act to prevent the employer from making deductions from his workmen's wages in his own interest. Lord Hunter in the Court of Session (4) sought to surmount this difficulty by regarding the arrangement in the present case as "amounting to a mandate by the pursuer to the defenders to allocate part of his wages in payment of the rent due by his father. . . . In reality what was done was a voluntary employment by the pursuer of his wages, or part of his wages. If the pursuer had authorized his father to receive his wages or part thereof, and if his father on receiving the wages had paid the defenders, apparently the case would have come within the situation figured by Lord Herschell. The mere fact that this procedure was not followed is, in my opinion, an insufficient reason for holding the arrangement illegal." I cannot approve this reasoning,

(1) [1892] 2 Q. B. 662, 666.
(2) [1906] A. C. 136, 142.
(3) [1894] A. C. 383.
(4) 1934 S. C. 254, 261.

which seems to me to afford an excellent illustration of the danger which attends the process, once it is started, of accepting equivalents for the plain requirements of the statute. There is, in my opinion, all the difference in the world between the case where the workman directs his employers to pay part of his wages to a third party and the case where the workman assents to his employers retaining part of his wages for their own behoof, whether in discharge of a debt due to them by the workman himself or in discharge of a debt due to them by some third party. In *Williams'* case (1) it was held that employers when paying their employee's wages could not, without contravening the Act, set off a judgment debt due by their employee to them. No more, in my view, could they legally have set off a debt due to them by a third party. In *Williams'* case (1) the employee objected to the set-off, but the contravention would have been committed equally if he had assented.

I accordingly reach the conclusion that the deductions which in the present case the respondents made from the appellant's wages were in contravention of the statute and cannot be justified by anything that was decided in *Hewlett* v. *Allen*. (2)

2. The question next arises whether the appellant can recover the amount of the deductions. He invokes s. 4 of the Act of 1831, which as amended provides that "every artificer . . . . shall be entitled to recover from his employer . . . . the whole or so much of the wages earned by such artificer . . . . as shall not have been actually paid to him by such his employer in the current coin of this realm." Here again the statute seems sufficiently clear in its terms, but again it is said that authority provides the respondents with a means of escape.

In considering this question it must be borne in mind that under s. 3 the deductions which I have found to be in contravention of the Act are to be treated as "illegal, null, and void," and that under s. 9 the respondents by making these deductions incurred the statutory penalties. Nevertheless it

(1) [1906] A. C. 136.

(2) [1894] A. C. 383.

is said that in a civil action for recovery of the amount of the deductions the respondents can successfully plead the appellant's assent to the deductions as operating to bar his claim. There are certainly unmistakable indications of judicial opinion that when the parties come into a civil court the employers may put forward, in answer to a claim for recovery of illegal deductions, defences which would afford no answer to a charge of contravention of the statute. In *Hewlett's* case (1) in the Court of Appeal this was clearly the opinion of Bowen L.J. That eminent judge took the view that, because s. 5 expressly precluded the employer from pleading certain specific heads of set-off in answer to a suit for recovery of wages illegally deducted, the inference was that other heads of set-off might legitimately be pleaded. He says (2): "Beyond these lines" [i.e. the specifically forbidden set-offs] "all legal and equitable rights of set-off, and all legal and equitable defences other than payment, are still left open in any civil action to the employer;" and he and his colleagues accordingly held it a good defence "in the nature of a set-off or counter-claim" that the sum deducted had been "paid over, professedly on the plaintiff's behalf" to the treasurer of the benefit club, and that the plaintiff had "subsequently ratified and assented to such payment and expenditure." (3) This, as I have already shown, was not adopted as the ground of judgment in your Lordships' House (4), where it was held that there had been no contravention of the Act. But in *Williams'* case (5) there are also indications of opinion by Lord Davey (6) and Lord Atkinson (7) that deductions which the employer cannot legally make at his own hand when paying wages may nevertheless in some cases be admissible by way of set-off when the employee seeks to recover the deductions by civil process. I may point out that in *Williams'* case (5) the action was not one for recovery of the deductions but for a declaration of their illegality, and the observations of the noble and learned Lords to which I have referred were therefore obiter. I do not, however, presume, nor do I find it necessary, to express an opinion whether they were well founded. Assuming that they were, I do not find that they assist the respondents here. The respondents are not pleading set-off in answer to the appellant's claim. They are pleading personal bar founded on acquiescence or assent. In my opinion the respondents cannot avail themselves of this plea. Under the statute the deductions were illegal, null, and void. I cannot see how a party by acquiescing in a nullity can give it validity for purposes of defence. A nullity cannot be ratified, for there is nothing to ratify. The appellant's assent to the deductions is in my opinion of no more avail to the respondents in these civil proceedings than it would have been in a prosecution for penalties. The respondents have committed an illegality in withholding part of the appellant's wages. I do not think that when the appellant now seeks to recover what has been illegally withheld from him the respondents can effectively plead his assent to the illegality.

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(1) [1892] 2 Q. B. 662.
(2) Ibid. 668.
(3) Ibid. 672.
(4) [1894] A. C. 383.
(5) [1906] A. C. 136.
(6) Ibid. 142.
(7) Ibid. 146.

I accordingly move your Lordships to allow this appeal, to recall the findings in law of the Second Division of the Court of Session and of the Sheriff, and to restore the findings in law of the Sheriff-Substitute.

LORD WRIGHT. I am so fully in agreement with the reasoning and conclusions expressed in the speech of my noble and learned friend Lord Macmillan that I should not add anything were it not that we were taking a different view from that taken by the majority of their Lordships of the Second Division.

The crucial question in this case is whether the sums deducted and retained week by week by the respondents from the appellant's wages are deductions which are illegal and null and void so that a suit lies for the recovery of these sums under s. 4 of the Truck Act, 1831. On the imperative words of the section the right of recovery would seem to be plainly secured in respect of so much of the wages earned as have not been paid to the appellant " in the current coin of this realm " ; and the main ground on which the judgment appealed from proceeds seems to be that, as the sums retained were so retained on the mandate or with the assent of the appellant, these sums can be deemed to be substantially equivalent to payments made to the appellant himself in current coin within the meaning of the Act on the principle laid down by Lord Watson in *Hewlett* v. *Allen* (1), whose words appear to sum up the effect of the decision of this House on the facts of that case. But that decision is based on the fact that the sums in question were paid on the worker's mandate to a third party in order to discharge a debt of the worker due to that third party. The worker's request to pay the third party on her behalf made, so it was held, the third party the worker's agent or hand to receive the current coin. In the present case the respondents retained the sums now in suit in order to pay a debt due, not to a third party, but to themselves, and not due from the appellant, but due from another party—namely, his father; and, furthermore the father's debt was for rent in respect of premises belonging to the respondents of which the father was tenant. If express provision was required in s. 23 of the Act to validate a deduction for the rent of premises demised or let to the workman, it would seem impossible to justify a deduction of the rent of premises not demised or let to the appellant, but to another person. The fact that the appellant lived with his father in the premises is, I think, immaterial. That *Hewlett's* case (1) went to the limit of what is permissible in the way of liberal construction of the Act is in my opinion clear from a consideration of *Williams* v. *North's Navigation Collieries* (1889) *Ld.* (2); it is not true to say that *Williams'* case (2) was distinguished from *Hewlett's* case (1) on the ground that in the former case the workman did not assent, whereas in the latter he did assent, to the deduction. Lord Davey, in *Williams'* case (3), thus sums up the statutory position: " By s. 23 and s. 24, certain deductions are permitted to be made, or, to use the language of the marginal note, ' particular exceptions to the generality of the law,' are made under strictly defined conditions, and no other deductions or particular exceptions are in my opinion authorized." Subsequent statutes have enlarged the list of permissible deductions but have not affected the principle. Lord Davey further emphasized that the employer was not entitled to retain a part of the workman's admitted wages in payment of a debt to himself: "Payment in account will not do"; "the employer cannot for the purpose of compliance with the statute be both payer and payee." These phrases, quoted by Lord Davey (1) from Bowen L.J.'s judgment in *Hewlett* v. *Allen* (2), apply with even greater force where, as here, the money was retained for a debt, not due from the workman, but from another party.

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(1) [1894] A. C. 383, 394.

(2) [1906] A. C. 136.

(3) Ibid. 142.

Some reliance was placed in support of the respondents' contention on s. 5 of the Act. That section was applied by Bowen L.J. in *Hewlett's* case (3) as justifying in the action a set-off or reduction of the plaintiff's demand on the ground that the sums in debate had been actually paid away to a third party in satisfaction of the plaintiff's debt and under his mandate; that was held to constitute a ground of cross-claim or set-off subsequent to and independent of the contract of employment on the footing that the actual deduction was illegal, as Bowen L.J. held it was, under s. 4. In the present case there was no actual disbursement of money by the respondents, who simply kept for themselves the part of the wages retained. The ruling of Bowen L.J. accordingly does not cover the present case. Sect. 5, whatever may be its precise scope, which is far from clear, may here, in my opinion, be disregarded; indeed I do not gather that any specific set-off is sought to be established if the deductions which the respondents made are held to be illegal, as I think they must be, and if the plea of personal bar, which is something quite different from set-off or cross-claim, is rejected, as I think it must be for the reasons stated by Lord Macmillan.

This is my opinion on the actual words of the Truck Act,

(1) [1906] A. C. 142.
(2) [1892] 2 Q. B. 662, 666.
(3) Ibid. 667, 668.

1831. But if I also consider what I conceive to be the policy of the Act, a case such as the present seems entirely to fall within it.

LORD ALNESS. Were it not for the importance of the questions at issue in this case, and for the fact that your Lordships, as has been pointed out, are reversing the decision of the Second Division of the Court of Session, I should be well content to express my formal concurrence in the opinions delivered by my noble and learned friends Lord Macmillan and Lord Wright, and in the reasons upon which those opinions proceed. In the circumstances I beg leave to add a few words of my own to what has been already said.

In the first place, I am clearly of opinion that the respondents, in what they did, contravened the injunction contained in s. 3 of the Truck Act, 1831. In order to reach a sound conclusion on that matter one must steadily bear in mind (1.) what the respondents are by statute enjoined to do, and (2.) what they in point of fact did. (1.) The respondents, as employers of the appellant, are enjoined by Act of Parliament to pay to him the whole amount of the wages earned by him in the current coin of the realm, and not otherwise. The words of the statute, authority apart, would appear to be plain, and indeed intractable. (2.) The respondents, in point of fact, instead of paying to the appellant, in the current coin of the realm, the wages earned by him, deducted from these wages the rent payable to them by the appellant's father as occupier of a house belonging to them.

Prima facie this would seem to be an illegal deduction; and indeed the respondents in argument appeared to recognize the cogency of this view. They sought, however, to take shelter under the ægis of *Hewlett's* case (1), and they contended that it avoided the result for which the appellant contended. Indeed, it is not too much to say that the opinions of the majority in the Court below were based largely, if not solely, upon the authority of *Hewlett.* (1) Now, while the resemblances between this case and the case of *Hewlett* (1) are considerable,

(1) [1894] A. C. 383.

the differences are even more striking. *Hewlett's* case (1) decided, as Lord Murray pointed out, that the entire wages of the employee in that case had actually been paid to him within the meaning of the statute. I am quite unable to affirm that in this case, where a portion of the appellant's wages remained in the hands of the respondents, that was so. Retention of wages due by employers to a workman cannot equiparate payment to him, although payment to a third party, with his consent, may be payment in the sense of the statute. In this case the respondents were both payers and payees, and that fact, in my opinion, is fatal to their contention. In *Hewlett's* case (1), the employers were not enriched by the arrangement which was made ; in this case they definitely are. In *Hewlett's* case (1) the employers made a payment on behalf of their employee ; here they retained a certain deduction, not for the appellant's benefit, but for their own. *Hewlett's* case (1) was one of set-off ; this is not a case of that character. The circumstances of the two cases appear to me to differ toto cælo, as indeed Lord Hunter pointed out. I therefore reach the conclusion that the respondents acted in plain breach of their statutory duty, and that the case of *Hewlett* (1) affords them no protection from that inference.

In the second place, I am of opinion that the appellant is not, as the respondents contended, personally barred from enforcing his claim. Personal bar in this connection is a Scottish doctrine, and the validity of the respondents' contention falls, I apprehend, to be decided by the law of Scotland. Now, ex hypothesi of the argument, the deduction made by the respondents from the appellant's wages is, by statute, declared to be "illegal, null, and void." In these circumstances the respondents' argument that the appellant is barred by mora and acquiescence from vindicating his claim appears to me to be a startling, if not indeed an audacious contention. To my mind it is a novel doctrine in the law of Scotland that a plea of personal bar can avail against that which is declared by statute to be illegal, null, and void. The proposition appears to me really to be a contradiction in

(1) [1894] A. C. 383.

terms. The doctrine of mora and acquiescence is, in my opinion, foreign to a case of this kind. Acquiescence in my judgment can present no bar to an action founded on the illegality and nullity of the thing acquiesced in. No decision was cited by the respondents in which the judgment of the Court proceeded on the view for which they contended.

I will only add that I find myself in agreement with the dissenting opinion of the learned Lord Justice-Clerk, and with the reasoning upon which it is based. I therefore concur in the motion which has been moved that this appeal should be allowed.

Interlocutor appealed from reversed: Interlocutor of the Sheriff-Substitute, so far as regards his findings in law, restored: Ordered that the cause be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment: Further ordered that the respondents do pay to the appellant the costs of the action before the Sheriff and in the Second Division of the Court of Session, and also the costs incurred by him in this House, such last mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, June 21, 1935.

Solicitors for appellant: *W. A. G. Davidson & Co., for I. H. Irvine-Jones, Edinburgh, and W. Philp, Kirkcaldy.*

Solicitors for respondents: *Simmons & Simmons, for Wallace, Begg & Co., W.S., Edinburgh, and Ross & Connel, W.S., Dunfermline.*

nguished. JERRED *v.* T. RODDAM
T & SON, LTD. [1948] 2 All E.R.

[HOUSE OF LORDS.]

HILLEN AND PETTIGREW . . . . . APPELLANTS; H. L. (E.)*

AND 1935

I.C.I. (ALKALI), LIMITED . . . . . RESPONDENTS. *July* 4.

Negligence—Invitor and Invitee—Owners of Barge—Stevedore—Unloading Cargo—Collapse of Hatch covering used as staging for Cargo without support.

The appellants were members of a stevedores' gang employed to load a steamship from the respondents' barge *Hibernia*. The cargo in the hold of the barge consisted of bicarbonate of soda in bags and soda in kegs on top of the bags. The foreman required the bags to be loaded before the kegs. The kegs were therefore laid along the deck of the barge to enable the bags to be slung on board the steamer by the ship's derricks. After this had been done the crew of the barge replaced the hatch covers on the after portion of the hatch, unsupported by the fore and aft beam. The engineer threw a sling on one of the hatch covers and the appellants placed seven kegs in the sling. When they were moving the eighth keg, the hatch covers gave way and the appellants fell into the hold and were injured. The men knew that it was dangerous and improper to load cargo off the hatch covers:—

Held, that the appellants had no cause of action against the respondents, because:—

(1.) the crew of the *Hibernia* had no authority to invite the appellants to use the hatch covers for the purpose for which, or in the way in which, they were used;

(2.) consequently, the appellants in so using the hatch covers were trespassers, and not invitees of the respondents;

(3.) that, even if they were invitees, they were guilty of contributory negligence.

The House found it unnecessary to discuss the construction of Rule 34 (*b*) of the Dock Regulations made under s. 79 of the Factory and Workshop Act, 1901, which rule provides that "Hatch coverings shall not be used in the construction of deck or cargo stages, or for any other purpose which may expose them to damage."

Order of the Court of Appeal [1934] 1 K. B. 455 affirmed on different grounds.

APPEAL from an order of the Court of Appeal (1) setting aside a judgment of Goddard J. in favour of the plaintiffs, the present appellants, and giving judgment for the defendants.

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(1) [1934] 1 K. B. 455.

* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD WRIGHT, and LORD ALNESS.

The action was tried at Liverpool before the learned judge with a common jury. The facts are stated in detail in the judgment of Lord Atkin, and are summarized in the headnote. Each plaintiff brought an action for damages for personal injuries caused through the alleged negligence of the defendants their servants or agents. The statements of claim alleged that the plaintiffs were on the barge *Hibernia* upon business in which they and the defendants had a common interest—namely, the transference of cargo from the said barge to the steamship *Darro*, and that owing to the negligence of the defendants their servants or agents a hatch cover on which the plaintiffs were standing gave way and the plaintiffs were precipitated into the hold.

The defences alleged contributory negligence on the part of the plaintiffs, and alternatively that the plaintiffs voluntarily incurred the risk of working on the hatch cover in the circumstances. The plaintiff Hillen in cross-examination admitted that it was " improper and highly dangerous to put kegs on hatch covers." Another witness for the plaintiffs said that he knew it was " dangerous and prohibited to use hatch covers for loading cargo from." The plaintiff Pettigrew was unable, on account of his injuries, to be present at the trial.

The learned judge held that, over and above the danger of which the plaintiffs were aware, there was an added danger —namely, the absence of the fore and aft support ; and that it was the duty of the crew of the *Hibernia* at the least to warn the plaintiffs that the hatch covers were unsupported. On this ground he gave judgment for the plaintiffs for the amounts found by the jury—namely, 332*l.* for the plaintiff Hillen and 1350*l.* for the plaintiff Pettigrew.

The defendants appealed. The Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) allowed the appeal and set aside the verdict and judgment. (1)

The plaintiffs appealed to this House.

May 28. *Maxwell Fyfe K.C.* and *G. H. Oliver* for the appellants.

(1) [1934] 1 K. B. 455.

The argument of counsel appears in the judgment of Lord Atkin.

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Viscount Erleigh K.C., *F. A. Sellers K.C.*, and *A. H. Glenn Craske* for the respondents were not called on.

May 31. The House took time for consideration.

July 4. LORD ATKIN. My Lords, I have been asked to say that my noble and learned friends Lord Thankerton and Lord Wright concur in the opinion which I am about to deliver.

My Lords, this is an appeal from an order of the Court of Appeal, who reversed a judgment for the two plaintiffs given by Goddard J. at a trial in Liverpool with a common jury. The two plaintiffs, now appellants, were dock labourers employed by the Pacific Steam Navigation Company to load the s.s. *Darro*. They were members of a stevedores' gang working under a foreman named Senior. On the day in question they were directed to assist in loading cargo on the *Darro* from the barge *Hibernia* lying alongside. The *Hibernia* was owned by the respondents and her cargo consisted of soda in kegs and bags, the kegs being on top. She had one hold and a hatch 41 feet long and about 11 feet 6 inches wide which was covered by twenty hatch covers. There were two hatchway beams athwart the hatch and fore and aft beams in three sections which passed along the centre of the hatch resting on the crossbeams, and served to support the hatch covers when in position. They had to be removed when the barge was being loaded or unloaded. The hatch had coamings about 1 foot 3 inches high. The hold was about 15 feet deep. The barge had a crew of three, master, mate and engineer. The stevedore foreman required the bags to be hoisted on the *Darro* before the kegs. The kegs were therefore placed apparently by hand on the narrow deck of the barge, a passage about 3 feet wide; and the bags were conveyed to the *Darro* in canvas slings carried by the ship's derricks. The barge cargo for the *Darro* was contained in the after third of the hold, abaft the after transverse beam. The remainder of the hold was occupied

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by cargo for two other vessels to which the barge was to proceed after completing her discharge to the *Darro*. After the bags for the *Darro* had been transported in the slings the crew of the barge put the hatch covers on the after portion which had been uncovered. They did not put on the fore and aft beam. The kegs still remained to be shipped from the barge to the *Darro*. The engineer threw a sling on to the covered hatch and assisted the two plaintiffs to place eight of the kegs in the sling. He probably told them it was all right. When seven kegs were in the sling and the eighth was being put in, two of the hatch covers gave way, and the two plaintiffs and the engineer fell through into the hold. One of them, Pettigrew, received very serious injuries. The plaintiffs brought separate actions, afterwards consolidated, against the respondents on the ground that the defendants were negligent in providing unsafe hatch covers, or at any rate in not warning them that the hatch covers were not at the time supported by the fore and aft beam.

The judge left to the jury the question whether the plaintiffs had voluntarily incurred the risk and danger. Other questions, including a plea of contributory negligence, were apparently left for decision to the judge. In a considered judgment he found that there was a duty on the crew of the barge to warn the plaintiffs of an added risk—namely, the absence of support to the hatch covers of which they were ignorant, and gave judgment for the damages found by the jury.

On appeal the members of the Court of Appeal came to the conclusion that by the terms of Rule 34 (*b*) of the Dock Regulations, 1925, made under s. 79 of the Factory and Workshop Act, 1901, it was unlawful to use the covered hatch for the purpose of discharging cargo from it: and that no duty towards the plaintiffs in those circumstances could be established against the defendants.

The rule is: "(*b*) Hatch coverings shall not be used in the construction of deck or cargo stages or for any other purpose which may expose them to danger." The rules admit of doubt as to whether this wording is applicable to hatch covers placed in position. It is suggested that the other purpose must be some such purpose as the construction of a stage where the rule seems to contemplate their separate use when removed from the hatch. Your Lordships did not find it necessary to ask counsel for the respondents to discuss the construction of the rule, and express no opinion upon it: as it seems sufficient to decide this case upon a ground which does not involve a finding of illegality. I do not therefore propose to canvass the judgments in the Court of Appeal on this matter.

The rights of the parties appear to me to be ascertained when reference is made to the admission of the plaintiff Hillen: "I know it is not the right thing to do to load off hatch covers. . . . . I have seen cargoes put on hatch covers, it is wrongfully dangerous, and should not be done." This evidence is confirmed by the foreman.

The plaintiffs' claim against the defendants is based upon the theory that they were invitees of the defendants for business purposes, and that the defendants consequently owed them a duty to take reasonable care to see that the barge was reasonably safe or at least to warn them against any hidden danger of which they were unaware but which was known or ought to have been known to the defendants or their servants. My Lords, in my opinion this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Scrutton L.J. has pointedly said: "When you invite a person into your house to use the staircase you do not invite him to slide down the banisters." (1) So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly. In the present case the stevedores knew that they ought not to use

(1) *The Calgarth* [1926] P. 93, 110.

the covered hatch in order to load cargo from it; for them for such a purpose it was out of bounds; they were trespassers. The defendants had no reason to contemplate such a use; they had no duty to take any care that the hatch when covered was safe for such a use; they had no duty to warn any one that it was not fit for such use. I know of no duty to a trespasser owed by the occupier of land other than, when the trespasser is known to be present, to abstain from doing an act which if done carelessly must reasonably be contemplated as likely to injure him, and, of course, to abstain from doing acts which are intended to injure him. The owners of the barge therefore were not guilty of any breach of duty to the plaintiffs.

It is said, however, that whatever may have been the scope of the general invitation of the owners to the stevedores' men, in this case the owners' servants, the crew, extended a special invitation to the plaintiffs to use the hatch for the particular purpose, and neglected to warn them of the danger which they knew and the plaintiffs did not. I am far from satisfied that any one so invited the plaintiffs; I think the engineer's part was confined to a friendly suggestion that they should all do something irregular together. But, whether there was an invitation by the crew or any member of the crew, I am quite satisfied that it was wholly without the authority of the owners, and quite outside the ostensible scope of the authority of the crew. The owner of a barge does not clothe the crew with apparent authority to use it or any part of it for purposes which are known to be extraordinary and dangerous. The crew could not within the scope of their employment convert it into a dancing hall or drinking booth. They could not invite stevedores to work the engines or take part in the navigation. The most that could be said of the engineer is that, if he saw a trespasser unwittingly entering into danger upon the employer's property, he might owe a moral duty to the trespasser to warn him. But for breach of a servant's moral duty an employer is not vicariously liable. In the circumstances of this case it matters not whether the fore and aft beams had or had not been at any time in position: any action of the crew in respect of them imposed no liability upon the respondents. I am of opinion that the facts proved disclosed no cause of action against the owners of the barge, and that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD TOMLIN. My Lords, I have had an opportunity of considering in print the opinion which has just been delivered by my noble and learned friend on the Woolsack, and I concur in it in all respects.

I have been asked to read the following judgment of my noble and learned friend Lord Alness.

LORD ALNESS (read by LORD TOMLIN). My Lords, in my judgment the plaintiffs' claims fail.

In the first place, I am of opinion that they have not proved negligence on the part of the defendants. The evidence demonstrates that the hatch was put by the plaintiffs to a use which the defendants had no reason to anticipate, and against which they were therefore not bound to provide. No duty having been left undischarged by the defendants, no liability attaches to them.

As regards the invitation which the engineer is alleged to have given, I am of opinion that that invitation is not proved, and further, that if it had been proved to have been given, it was outside the scope of the engineer's authority to give it.

If these views be sound, no negligence on the part of the defendants is established, and that in itself is sufficient for the disposal against the appellants of the case.

But, in the second place, on the evidence of the plaintiff Hillen—and the other plaintiff Pettigrew, who was too ill to be examined, was taken as concurring with Hillen's evidence—a case of contributory negligence, persisting up to the time of the accident, is disclosed. Said the plaintiff Hillen: "I know it was not the right thing to do to load off hatch covers. . . . . I have seen cargoes put on hatch covers; it is wrongfully dangerous, and should not be done." That,

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in my opinion, is an unqualified admission of contributory negligence on the part of Hillen.

It is to me a novel doctrine of law that an employer in the position of the defendants is bound to foresee and provide against a course of conduct on the part of an employee of another employer which is admitted by him to be wrong and dangerous. The plaintiff Hillen's admission, in my judgment, puts him out of Court, and disentitles him from recovering damages from the defendants. To hold otherwise would be to subvert the principles upon which, as I apprehend, the law of reparation is based. The plaintiff Pettigrew's case must, in the circumstances, share the same fate as that of the plaintiff Hillen.

I find it difficult to understand why the learned trial judge neither dealt in his opinion with the plea of contributory negligence, nor submitted it to the adjudication of the jury. The plea is none the less effective, even at this late hour, on that account. It furnishes, I think, a complete answer to the plaintiffs' claims.

I therefore arrive at the same conclusion as my noble and learned friend on the Woolsack, and I concur in the motion which he has moved.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, July 4, 1935.

Solicitors for appellants: *Pattinson & Brewer, for G. J. Lynskey & Sons, Liverpool.*

Solicitor for respondents: *William Morris.*

[PRIVY COUNCIL.]

BELL TELEPHONE COMPANY OF CANADA . . . . APPELLANT;

J. C.*
1935
July 25.

AND

VILLE ST. LAURENT . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, QUEBEC (APPEAL SIDE).

Canada (Quebec)—Municipal Law—Municipal and School Taxes—Telephone Switchboard—Not "Immoveable by its Nature"—Incorporation with, or Adherence to, the soil—Civil Code, art. 376*—Cities and Towns' Act* (*R. S. Q.*, 1925, *c.* 102), *s.* 521*—Education Act* (*R. S. Q.*, 1925, *c.* 133), *s.* 249.

A telephone switchboard with associated equipment belonging to the appellant company and connected with its telephone system by wires and cables was so placed in premises of which the company was lessee as to rest on the floor without being attached thereto:—

Held, that the switchboard and its equipment, not being a structure incorporated with or adherent to the soil, or physically incorporated as part of a structure which was incorporated with or adherent to the soil, was not a structure "immoveable by its nature" within the meaning of "building" in art. 376 of the Quebec Civil Code. The test whether a structure is "immoveable by its nature" under that article is incorporation with, or adherence to, the soil, or physical incorporation as part of a structure so incorporated with, or adhering to, the soil. The question whether the structure of which it is claimed to be part—in the present case the poles, wires and cables of the appellant's telephone system—is commercially able to operate without its assistance is irrelevant, and it could not be said that the switchboard was physically incorporated in the structure composed of the poles, wires and cables of the appellant's undertaking.

Montreal Light, Heat and Power Consolidated v. *City of Westmount* [1926] S. C. R. 515; and *Montreal Light, Heat and Power Consolidated* v. *City of Outremont* [1932] A. C. 423, explained.

Observations of Rinfret J. in *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry, Ltée.* [1926] S. C. R. 655, pp. 668, 670, approved.

Judgment of Court of King's Bench, Quebec (Appeal Side) (1934) Q. R. 57 K. B. 11, reversed.

APPEAL (No. 11 of 1935) from a judgment of the Court of King's Bench, Quebec (Appeal Side) (June 20, 1934), reversing

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ALNESS.

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a judgment of the Circuit Court for the District of Montreal (June 28, 1933).

The appellant, the Bell Telephone Company of Canada, was the owner of, and operated in the Province of Quebec, a telephone system, part of which was situated within the territorial limits of the respondent, La Ville St. Laurent. That part of the appellant's property consisted of poles, wires, cables, etc., and of a telephone switchboard and associated equipment located in premises of which the appellant was tenant under a lease.

The action was brought by the respondent for the recovery of municipal and school taxes imposed upon the immovables of the appellant situated within the respondent municipality for the years 1926, 1927 and 1928. The taxes claimed for the years 1926 and 1927 were levied upon the assessed value of $25,000, placed upon the poles, cables, wires and conduits of the appellant. The assessment upon which the taxes for 1928 were levied was for $45,000, the $20,000 in excess of the assessment for the previous years being due to the inclusion amongst the immovable facilities of the appellant of the telephone switchboard and associated equipment.

By their original pleadings the appellant contested the right of the respondent to recover any of the taxes claimed, but by a subsequent pleading confessed to judgment for all taxes claimed except those levied upon the assessment of the switchboard. The confession of judgment was refused by the respondent, and the only question remaining for determination was whether the appellant was liable to be assessed upon the value of the switchboard and liable for the taxes levied thereon.

The Circuit Court (Rivet J.), being of opinion that the switchboard was not immovable because it was not "incorporé au sol," and because it could be easily removed, held that it was non-taxable, and maintained the confession of judgment made by the appellant.

An appeal by the present respondent to the Court of King's Bench (Appeal Side) (Bernier, Bond, Galipeault, Walsh, and St.-Jacques JJ.) was allowed. The Court were of opinion

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that the telephone switchboard in question did not form part of the building in which it was installed, and was not placed therein to complete the same, but in order to complete the telephone system of the appellant, which system was immovable property; that the switchboard was necessary to operate the telephone, being connected with cables placed in the soil, which cables were the property of the appellant; that the switchboard formed an integral and essential part of the appellant's system, and that without the switchboard, the poles, cables and wires would be of no use whatsoever. The appeal is reported in Q. R. 57 K. B. 11.

The relevant statutory provisions, and the nature of the physical construction of the switchboard, appear from the judgment of the Judicial Committee.

1935. July 12. *Pierre Beullac K.C.* and *Roger A. Beullac* for the appellant. The right of the respondent to impose and levy the taxes in issue is conferred by s. 521 of the Cities and Towns' Act (R. S. Q., 1925, c. 102), and s. 249 of the Education Act (R. S. Q., 1925, c. 133). Those Acts contained no definition of the word "immoveable," and accordingly reference must be had to the Civil Code. He referred to arts. 374—382 inclusive. The Court of King's Bench had held the switchboard to be an "immoveable by its nature." It was either "immoveable by its nature" or not an immovable at all. The switchboard and the equipment rested on the floor of the premises by their own weight and were not fastened there with "iron or nails, embedded in plaster, lime or cement," (see art. 380 of the Civil Code), but on the contrary the whole of it could be removed without breakage or without destroying or deteriorating any part of the property in which they were located (see art. 380). For a thing to be immovable within the meaning of art. 376 of the Civil Code, direct contact must exist by the thing itself being incorporated in the soil, or by its being attached to a support itself embedded in the soil. Unless it could be said that the floors in the present case were there to support the switchboard there was no analogy between the floors of the premises and the poles acting as a support for the wires. There must be adherence to, or incorporation with, the soil. In *Bélair* v. *Ville de Ste.-Rose* (1), a bridge was held to be an immovable by its nature because it was a structure permanently affixed to the soil or bed of the river : in *Montreal Light, Heat & Power Consolidated* v. *City of Westmount* (2) " immoveable " was held to include gas mains, electric poles, wires, cables, etc., and *Montreal Light, Heat & Power Consolidated* v. *City of Outremont* (3) decided that gas mains constituted an immovable because they were " physically a construction fixed in the earth." The switchboard was not immovable by its nature. Reference was also made to *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry, Ltée.* (4), and to Mignault, Droit Civil Canadien, vol. 2, pp. 400–1, 407.

Aime Geoffrion K.C. for the respondent. " Immoveable " in the relevant sections of the statutes imposing the municipal and school taxes must be regarded as having the same meaning as " buildings " (" bâtiments ") within the meaning of art. 376 of the Civil Code. It has been decided in *Bélair* v. *Ville de Ste.-Rose* (1), in *Montreal Light, Heat & Power Consolidated* v. *City of Westmount* (2), and in *Montreal Light, Heat & Power Consolidated* v. *City of Outremont* (3), that the term " buildings " used in art. 376 of the Civil Code included not only a building proper, but also a bridge, gas mains, electric poles, wires, cables, etc. The switchboard formed an integral part of the telephone system of the appellant and was therefore part of a " building " and therefore an " immoveable " and as such taxable.

Beullac K.C. replied.

July 25. The judgment of their Lordships was delivered by

LORD THANKERTON. The present action was brought by the respondent on October 29, 1929, for the recovery of municipal and school taxes imposed upon the immovables of the appellant situated within the municipality of the respondent for the years 1926, 1927 and 1928. The taxes

(1) (1922) 63 Can. S. C. R. 526.
(2) [1926] S. C. R. 515.
(3) [1932] A. C. 423.
(4) [1926] S. C. R. 655.

imposed for the years 1926 and 1927 were levied upon an assessed value of $25,000 placed upon " poteaux, fils, cables et tout le systême " ; for the year 1928 the assessed value was increased to $45,000. It is agreed that the increase was due to the inclusion of the value placed upon a switchboard, with its associated plant, which the appellant had brought from another area, and had placed in premises of which the appellant was not the owner, but only a tenant under a lease, and which had been put into service on April 7, 1928.

While in the defence as filed the appellant disputed liability for any of the taxes claimed, the appellant subsequently filed a pleading, confessing to judgment for all the taxes claimed except those levied in 1928 upon the increased value of $20,000 in respect of the switchboard. The confession of judgment was refused by the respondent. Accordingly the only question left in issue is in relation to the switchboard. On this point the appellant succeeded before the Circuit Court, but, on appeal to the Court of King's Bench (Appeal Side), the respondent was successful.

The power of the respondent to levy the municipal taxes is derived from s. 521 of the Cities and Towns' Act (R. S. Q., 1925, c. 102), which provides in part as follows :—

" 521. The council may impose and levy, annually, on every immoveable in the municipality, a tax of not more than two per cent. of the real value as shown on the valuation roll."

The school taxes are levied, under the authority of s. 249 of the Education Act (R. S. Q., 1925, c. 133), upon " all taxable property in the school municipality", which is identified with the subjects taxable in respect of the municipal taxes.

It has been decided by this Board in *Montreal Light, Heat & Power Consolidated* v. *City of Outremont* (1) that the word " immoveable " in s. 521 of the Cities and Towns' Act must bear the meaning given to it by the Quebec Civil Code, the material articles of which are as follows :—

" 374. All property, incorporeal as well as corporeal, is moveable or immoveable.

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(1) [1932] A. C. 423, 435.

" 375. Property is immoveable either by its nature, or by its destination, or by reason of the object to which it is attached, or lastly by determination of law.

" 376. Lands and buildings are immoveable by their nature.

" 377. Windmills and water-mills, built on piles and forming part of the buildings, are also immoveable by their nature when they are constructed for a permanency.

" 378. Crops uncut and fruits unplucked are also immoveable.

" According as grain is cut and as fruit is plucked, they become moveable in so far as regards the portion cut or plucked. The same rule applies to trees ; they are immoveable so long as they are attached to the ground by their roots and they become moveable as soon as they are felled.

" 379. Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immoveable by their destination so long as they remain there.

" Thus, within these restrictions, the following and other like objects are immoveable :

" 1. Presses, boilers, stills, vats and tuns ;

" 2. All utensils necessary for working forges, paper-mills and other manufactories.

" Manure, and the straw and other substances intended for manure, are likewise immoveable by destination.

" 380. Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, imbedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached.

" Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect.

" 381. Rights of emphyteusis, of usufruct of immoveable things, of use and habitation, the right to cut timber perpetually or for a limited time, servitudes, and rights of action which tend to obtain possession of an immoveable, are immoveable by reason of the objects to which they are attached.

" 382. All moveable property, of which the law ordains or authorizes the realization, becomes immoveable by determination of law, either absolutely or for certain purposes. . . . . "

The switchboard in question is of the manual type known as No. 1-92 Jack. It is made up of seven sections, each of which consists of a cabinet containing an assembly of wires and electrical apparatus for connecting the telephone circuits of the subscribers either with one another or with trunk lines. It has certain ancillary equipment, such as a distributing frame, but this equipment affords no additional or separate argument. Apart from the actual physical connecting up of the cables and wires, which are led on to the premises, with the switchboard and its equipment, the latter are not in any way attached, but merely rest on the floor of the premises. On detachment of the physical connection with the cables and wires, the switchboard and its equipment are easily removable, without injury to the premises. As already stated, the appellant is only a tenant of the premises.

Accordingly, the respondent's claim is rested solely on art. 376 of the Code, and on the view that the switchboard is an integral part of that which is admittedly immovable —namely, the poles, wires and cables of the appellant.

The learned trial judge, on a review of the authorities, held that the only test was incorporation in the soil, and that the fact that the switchboard formed part of the telephone system of the appellant was not sufficient to make it become immovable by nature under art. 376 of the Code.

In the Court of King's Bench, the following paragraphs of the judgment express succinctly the reasons for the contrary view taken by that Court :—

" Considérant que dans l'espèce, le tableau téléphonique susdit ne fait pas partie de la bâtisse dans laquelle il est érigé, et qu'il n'est pas placé là pour la compléter, mais qu'il y est pour compléter le système téléphonique, lequel est immeuble ; qu'il est nécessaire pour les opérations du système, étant relié aux câbles placés dans le sol, lesquels câbles sont la propriété de la compagnie de téléphone ;

" Considérant qui le dit tableau est une partie intégrante et essentielle du système de la compagnie défenderesse, que sans lui, il n'existerait que des poteaux et des câbles sans utilité, et que pour constituer le système, il faut nécessairement et essentiellement le dit tableau les poteaux et les câbles."

The basis of this conclusion is expressed in the leading opinion, which was delivered by Bernier J., who states that it must now be taken as settled that the whole system—telephonic, telegraphic or similar systems of power transmission—constitutes an immovable. The learned judge cites, as authority for that proposition, three decisions to which their Lordships will shortly refer.

It appears to their Lordships that the above proposition clearly involves, as distinct from consideration of the physical nature of the attachment and whether it amounts to incorporation in the soil, consideration of the purpose which the attachment serves. It is agreed, and indeed it is stated in the first paragraph above quoted, that the physical attachment of the switchboard to the premises is insufficient to make it immovable by nature.

The earliest of the three decisions is *Montreal Light, Heat & Power Consolidated* v. *City of Westmount.* (1) The only property owned by the appellant in that case within the municipality consisted of gas mains, located in the public streets, a system of electric poles, wires and transformers, almost entirely upon the public streets, and meters placed in the houses of the consumers in the municipality. The Supreme Court of Canada held that the gas mains, poles, wires and transformers were immovable, but that the gas meters were not. In delivering the leading judgment, Anglin C.J. stated (2) :—

" The sole question with regard to the statutory power to impose the taxes sued for—municipal and school alike—is whether the subjects of taxation in this instance are immovables within the meaning of that term as used in art. 5730 of the R. S. Q., 1909. That question formed the principal matter of discussion at bar; but, while not free from difficulty, it would seem to be concluded adversely to the appellant by the decision of this court in *Bélair* v. *Ste.-Rose* (1) as to the gas mains and electric poles and wires, which, for the reasons there stated, must be regarded as 'buildings' (bâtiments) within the meaning of art. 376 C. C. and, therefore, 'immovable by their nature.' In that case three things were distinctly held: (*a*) that the scope of the word 'immovable' in art. 5730 (R. S. Q., 1909) is to be ascertained by reference to the provisions of the Civil Code, arts. 376 *et seq*: (*b*) that the word 'buildings' (bâtiments) in art. 376 C. C. is used in the sense of 'constructions'; (*c*) that it is immaterial to its taxability under art. 5730 that a construction is erected on land which does not belong to the person who owns the construction. There is no distinction in principle which would justify the taxation of the bridge in that case under art. 5730 as an immovable and warrant the exemption of the appellant's gas mains, and electric poles and wires in the present case as movables. The materials of which the structures—bridge and distribution systems alike—were comprised were all movables before being placed *in situ* and made part of such structures. Once incorporated in the structures, however, the materials lost that character; and the structures themselves took on the character of immovables.

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(1) [1926] S. C. R. 515.

(2) Ibid. 520.

" Nor does it appear to matter for the present purpose whether the immobilisation of the pipes, poles and wires be attributed to their physical connection with the land in or upon which they are placed, or with the buildings from which they radiate as parts of a distribution system. In either view they are immovables actually (in the sense of physically) situated in the municipality and thus 'come within the letter of the law' which confers the power to tax. *Partington's* case. (2) The immobilisation of the transformers may not be so clear. But they are usually attached to the company's poles and form an integral part of the system quite as much as the wires strung on the poles to carry the current."

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(1) (1922) 63 Can. S. C. R. 526.

(2) *Partington* v. *Attorney-General* (1869) L. R. 4 H. L. 100.

It may be noted that the transformers so referred to were firmly tied by wires and metal braces to the posts supporting the electric wires.

The proposition expressed by Bernier J. in the present case appears to have been derived from the second paragraph above quoted, but, in their Lordships' opinion, the language of Anglin C.J. does not warrant such inference. He clearly predicates that the materials must be physically incorporated as part of the structure which is itself incorporated in the soil. He clearly held that the wires and transformers were physically incorporated with the poles. The poles were in fact embedded in the soil, but the learned Chief Justice was also ready to regard the whole physical system of pipes, poles and wires as one incorporated physical structure. The element of commercial usefulness of that structure with or without any of its component parts is not referred to by him at all. In their Lordships' opinion, that case gives no warrant for the proposition laid down by the King's Bench Court in the present case.

The second decision is *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry, Ltée.* (1), in which, following the above decision, it was held that the pipes, poles, wires and transformers of an electric lighting system, erected in, and on, the public streets of a municipality were immovables; it was further held that the fact that they had been sold separately from the original generators, for the purpose of being later connected to generators belonging to the buyer did not cause them to lose the character of immovables. The opinion of the majority of the Court, which included Anglin C.J., was delivered in a very able judgment by Rinfret J., in which he reviews at length the judicial decisions and also the opinions of well-known jurists, from which he derives the following propositions (2):—

" La très grande majorité des commentateurs enseigne qu'il n'est pas nécessaire que la construction, pour être considérée comme immeuble par nature, soit fixée au sol à perpétuelle demeure. Il suffit que l'incorporation ne soit pas purement passagère et accidentelle. C'est le fait de l'attachement au sol que la loi considère. La condition de rigueur est que 'la construction, quelle qu'elle soit, fasse corps avec le sol'; qu'elle y soit 'cohérente', suivant l'expression de Pothier, ou 'adhérente,' suivante celle de Laurent. C'est toujours la régle: *Quod solo inaedificatur, solo cedit.* . . . . De même, les bâtiments ou autres ouvrages unis au sol sont immeubles par leur nature, qu'ils aient été construits par le propriétaire du fonds ou par un tiers possesseur; et ce, dans le cas même ou le tiers constructeur se serait réservé la faculté de les démolir lors de la cessation de sa jouissance. . . . . Ce résau, d'après l'opinion la plus générale, est un immeuble par lui-même, en tant que construction adhérente au sol, et non pas seulement comme faisant partie intégrante de l'usine génératrice de l'électricité."

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(1) [1926] S. C. R. 655.

(2) Ibid. 668, 670.

These passages, with which their Lordships are in accord, do not support the proposition of the Court of King's Bench.

The third decision referred to by Bernier J. is the decision of this Board in *Montreal Light, Heat & Power Consolidated* v. *City of Outremont* (1), in which the decision of the Supreme Court in the *City of Westmount* case (2), so far as relating to gas mains laid in the public streets, was challenged, but was approved of by this Board. The reasoning of the majority of the Supreme Court contained in the judgment of Anglin C.J. was held to be well founded, and Lord Tomlin, in delivering the judgment of the Board, said (at p. 436): "What then is an 'immovable' under the Civil Code? A gas main laid in the earth is an 'immoveable' in the sense that it is physically a construction fixed in the earth, though the individual pipes of which it is made up were moveable before they came to form part of the construction. . . . . The gas mains were never moveables, though constructed out of things which were moveables." This case likewise affords no support to the proposition of the Court of King's Bench.

In their Lordships' opinion, the existence of a building

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(1) [1932] A. C. 423.

(2) [1926] S. C. R. 515.

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which is immovable by its nature under art. 376 involves two things—namely, that you have a structure and that such structure is incorporated with, or adherent to, the soil. In the present case, the switchboard with its equipment, admittedly, is not itself incorporated with, or adherent to, the soil. Is it then part of a structure which is so incorporated or adherent? As shown by the cases cited, it must be physically incorporated as part of the structure. The question whether the structure of which it is claimed to be part, is commercially able to operate without its assistance is irrelevant, in the opinion of their Lordships, and, apart from that suggestion, it is clearly incorrect to say that the switchboard is physically incorporated in the structure composed of poles, wires and cables belonging to the appellant's undertaking.

Their Lordships agree with the reasoning of the Trial Judge, and they are of opinion that the judgment of the Court of King's Bench should be reversed and that of the Trial Judge restored, the appeal being allowed with costs to the appellant throughout. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.*
1935
Oct. 21.

GRANT . . . . APPELLANT;

AND

AUSTRALIAN KNITTING MILLS, LIMITED, AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Sale of Goods—Woollen Underwear—Defective Condition—Chemical Irritant—Latent Defect—Dermatitis contracted—Breach of Implied Condition—Retailer liable in Contract—Negligence in Manufacture—Liability in tort—South Australia Sale of Goods Act, 1895 (58 *&* 59 *Vict. No.* 630), *s.* 14, *sub-ss.* 1, 2.

The appellant, who contracted dermatitis of an external origin as the result of wearing a woollen garment which, when purchased from the retailers, was in a defective condition owing to the presence of excess sulphites which, it was found, had been negligently left in it in the process of manufacture, claimed damages against both retailers and manufacturers :—

Held, first, that the retailers were liable in contract for breach of implied warranty or condition under exceptions (i.) and (ii.) of s. 14 of the South Australia Sale of Goods Act, 1895 (identical with s. 14 of the English Sale of Goods Act, 1893).

Medway Oil and Storage Co., Ld. v. *Silica Gel Corporation* (1928) 33 Com. Cas. 195; and *Cammell Laird & Co., Ld.* v. *Manganese Bronze and Brass Co., Ld.* [1934] A. C. 402 referred to.

The presence of the deleterious chemical in the garment was a hidden and latent defect, and could not be detected by any examination that could reasonably be made; nothing happened between the making of the garment and its being worn to change its condition; and the garment was made by the manufacturers for the purpose of being worn exactly as it was worn in fact by the appellant.

Held, that those facts established a duty to take care as between the manufacturers and the appellant for the breach of which the manufacturers were liable in tort.

Principle of *Donoghue* v. *Stevenson* [1932] A. C. 562 applied.

That principle can be applied only where the defect is hidden and unknown to the customer or consumer.

The liability in tort was independent of any question of contract.

Judgment of the High Court of Australia (*Australian Knitting Mills, Ld.* v. *Grant* 50 C. L. R. 387) reversed.

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* *Present:* VISCOUNT HAILSHAM L.C., LORD BLANESBURGH, LORD MACMILLAN, LORD WRIGHT, and SIR LANCELOT SANDERSON.

APPEAL (No. 84 of 1934), by special leave, from a judgment of the High Court of Australia (August 18, 1933), reversing the judgment of the Supreme Court of South Australia (March 13, 1933).

The appellant, Richard Thorold Grant, a fully qualified medical man practising at Adelaide, South Australia, brought an action against the respondents, Australian Knitting Mills, Ld., and John Martin & Co., Ld., claiming damages on the ground that he had contracted dermatitis by reason of the improper condition of some "Golden Fleece" woollen underwear purchased by him from John Martin & Co., Ld., retailers, on June 3, 1931, and manufactured by the Australian Knitting Mills, Ld. He alleged that he began to wear the underwear on June 28, 1931, and that on the next day he became ill of a dermatitis which gradually developed into an acute form. The dermatitis, he pleaded, was caused by a chemical irritant —free sulphite—which the respondents, Australian Knitting Mills, Ld., had negligently omitted to remove in the process of manufacture, and he alleged that in breach of warranty the underwear was not fit for the purpose for which it was required and was not of a merchantable quality, and that the respondents, Australian Knitting Mills, Ld., had in breach of their duty to him not used due or proper care in the manufacture of the underwear. He claimed damages from both respondents.

The respondents denied liability.

The facts appear from the judgment of the Judicial Committee.

The Supreme Court of South Australia (Murray C.J.) found that the dermatitis was caused by bisulphite of soda in at least one pair of the underpants, and he gave judgment for the appellant for 2450*l*. The form of the judgment was against both respondents for a single amount.

An appeal to the High Court of Australia (Starke, Dixon and McTiernan JJ.; Evatt J. dissenting) was allowed. The appeal is reported at 50 C. L. R. 387.

Dixon and McTiernan JJ. were of opinion that the evidence was not sufficient to make it safe to find for the appellant.

Starke J. accepted substantially the findings of Murray C.J., but differed from him on his general conclusions of liability based on those findings.

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1935. July 1, 2, 4, 5, 8, 9, 11, 12, and 15. *G. P. Glanfield* and *P. J. H. Heycock* for the appellant. The question is whether the appellant suffered from dermatitis caused by a chemical agent in the garment. It was irrelevant whether his skin was normal or not. The degree of care owed by the manufacturer involved the special duty of rendering the garment safe and innocuous, or of protecting by warning or otherwise. Reliance was placed on *In re Polemis and Furness, Withy & Co.* (1) and on *Belhaven and Stenton Peerage* (2) where Lord Cairns, dealing with circumstantial evidence, said: "We have to consider the weight which is to be given to the united force of all the circumstances put together." On the question whether the appellant suffered from dermatitis caused by external cause it was necessary to consider the purely medical evidence and the whole history of the case. The general principles involved were dealt with in *Donoghue* v. *Stevenson* (3), in *Ballard* v. *North British Ry. Co.* (4), and in *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.* (5) The liability of the manufacturers in tort was founded on *Donoghue's* case (3) as expressed in the judgment of Lord Atkin. (6) Liability in respect of breach of implied condition depended on the decision in *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.* (5), where Lord Wright said: "The condition of fitness may in proper cases be implied where it was only in some respects that the buyer relied on the seller's skill and judgment." The sale of the underclothes was a sale by description, and a condition that they were of merchantable quality was to be implied. They were not of merchantable quality. On the question of fact that the Chief Justice had an opportunity of seeing and hearing the

(1) [1921] 3 K. B. 560.
(2) (1875) 1 App. Cas. 278, 279.
(3) [1932] A. C. 562.
(4) 1923 S. C. (H. L.) 43.
(5) [1934] A. C. 402, 429.
(6) [1932] A. C. 599.

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witnesses, and of forming his opinion as to reliability, see *Powell* v. *Streatham Manor Nursing Home.* (1)

Wilfrid Greene K.C., *Wilbur Ham K.C.* (of the Australian Bar), and *Ian C. Baillieu* for the respondents. *Heaven* v. *Pender* (2) dealt with a special class of person, while in *Donoghue* v. *Stevenson* (3) the manufacturer had so conducted himself that he was in effect handing the subject-matter direct to the ultimate consumer. The essence of that decision was that the relationship must be absolutely direct. There is no duty if there is no immediate relationship. The appellant, to succeed, must get right into that category of immediate relationship. It was the conduct of the manufacturer in treating the article in such a way that it went direct to the consumer without intermediate intervention that imposed on him the duty of taking care that the consumer was not injured. That was the real decision in *Donoghue's* case. (3) The manufacturers in the present case owed no duty to the appellant. [Counsel read a number of extracts from the judgments in *Donoghue's* case.] Lord Atkin (3) founded that duty on the fact that the consumer was so closely and directly affected by an act that the manufacturer ought reasonably to have had him in contemplation as being affected. Lord Thankerton (4) laid down that to establish the existence of the duty the method of dealing by the manufacturer must be such as intentionally to exclude interference with or examination of the article by any intermediate person. Lord Macmillan (4) said that responsibility ceases when control ceases. The principle laid down by Lord Atkin in *Donoghue's* case (4) was that where a manufacturer so dealt with goods as to establish a direct proximity between himself and the ultimate consumer, and there was no reasonable opportunity of inspection intervening between delivery by the manufacturer and the taking into effective consumption, then the manufacturer has a duty to take care that the consumer is not injured. That involved a very far-reaching proposition which might be extended to a variety

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(1) [1935] A. C. 243.
(2) (1883) 11 Q. B. D. 503.
(3) [1932] A. C. 562, 580.
(4) Ibid. 603, 622, 662.

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of things. What was true of the facts in *Donoghue's* case (1) was not true of the facts in the present case, where the garments might be handled and inspected by others before reaching the appellant. The finding of negligence by Murray C.J. was against the weight of evidence. There was no warranty or condition of fitness for any particular purpose on the part of the retailers. [Reference was also made to *Dominion Natural Gas Co., Ld.* v. *Collins & Perkins* (2) and to *Farr* v. *Butters Bros. & Co.* (3), in which *Donoghue's* case (4) was discussed in the Court of Appeal.]

Glanfield replied.

Oct. 21. The judgment of their Lordships was delivered by

LORD WRIGHT. The appellant is a fully qualified medical man practising at Adelaide in South Australia. He brought his action against the respondents, claiming damages on the ground that he had contracted dermatitis by reason of the improper condition of underwear purchased by him from the respondents, John Martin & Co., Ld., and manufactured by the respondents, the Australian Knitting Mills, Ld. The case was tried by Sir George Murray, Chief Justice of South Australia, who, after a trial lasting for twenty days, gave judgment for the appellant against both respondents for 2450*l.* and costs. On appeal the High Court of Australia set aside that judgment by a majority. Evatt J. dissented, and agreed in the result with the Chief Justice though he differed in regard to the Sale of Goods Act, 1895. Of the majority, the reasoning of Dixon J., with whom McTiernan J. concurred, was in effect that the evidence was not sufficient to make it safe to find for the appellant. Starke J., who accepted substantially all the detailed findings of the Chief Justice, differed from him on his general conclusions of liability based on these findings.

The appellant's claim was that the disease was caused by the presence, in the cuffs or ankle ends of the underpants which he purchased and wore, of an irritating chemical, namely, free sulphite, the presence of which was due to negligence in manufacture, and also involved on the part of the respondents, John Martin & Co., Ld., a breach of the relevant implied conditions under the Sale of Goods Act.

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(1) [1932] A. C. 562, 603, 622, 662.

(2) [1909] A. C. 640.

(3) [1932] 2 K. B. 606.

(4) [1932] A. C. 562.

The underwear, consisting of two pairs of underpants and two singlets, was bought by the appellant at the shop of the respondents, John Martin & Co., Ld., who dealt in such goods, and who will be hereafter referred to as "the retailers," on June 3, 1931. The retailers had in ordinary course at some previous date purchased them with other stock from the respondents, the Australian Knitting Mills, Ld., who will be referred to as the manufacturers; the garments were of that class of the manufacturers' make known as Golden Fleece. The appellant put on one suit on the morning of Sunday, June 28, 1931; by the evening of that day he felt itching on the ankles but no objective symptoms appeared until the next day, when a redness appeared on each ankle in front over an area of about 2½ inches by 1½ inches. The appellant treated himself with calomine lotion, but the irritation was such that he scratched the places till he bled. On Sunday, July 5, he changed his underwear and put on the other set which he had purchased from the retailers; the first set was washed and when the appellant changed his garments again on the following Sunday he put on the washed set and sent the others to the wash; he changed again on July 12. Though his skin trouble was getting worse, he did not attribute it to the underwear, but on July 13 he consulted a dermatologist, Dr. Upton,. who advised him to discard the underwear, which he did, returning the garments to the retailers with the intimation that they had given him dermatitis; by that time one set had been washed twice and the other set once. The appellant's condition got worse and worse; he was confined to bed from July 21 for seventeen weeks; the rash became generalized and very acute. In November he became convalescent and went to New Zealand to recuperate. He returned in the following February, and felt sufficiently recovered to resume his practice, but soon had

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a relapse, and by March his condition was so serious that he went in April into hospital, where he remained until July. Meantime, in April, 1932, he commenced this action, which was tried in and after November of that year. Dr. Upton was his medical attendant throughout and explained in detail at the trial the course of the illness and the treatment he adopted. Dr. de Crespigny also attended the appellant from and after July 22, 1931, and gave evidence at the trial. The illness was most severe, involving acute suffering, and at times Dr. Upton feared that his patient might die.

It is impossible here to examine in detail the minute and conflicting evidence of fact and of expert opinion given at the trial: all that evidence was meticulously discussed at the hearing of the appeal before the Board. It is only possible to state briefly the conclusions at which their Lordships, after careful consideration, have arrived.

In the first place, their Lordships are of opinion that the disease was of external origin. Much of the medical evidence was directed to supporting or refuting the contention, strenuously advanced on behalf of the respondents, that the dermatitis was internally produced and was of the type described as herpetiformis, which is generally regarded as of internal origin. That contention may now be taken to have failed: it has been rejected by the Chief Justice at the trial, and in the High Court by Starke and Evatt JJ., and, in effect also, by Dixon and McTiernan JJ. The evidence as to the symptoms and course of the disease given by the two doctors who attended the appellant is decisive: dermatitis herpetiformis is an uncommon disease, of a type generally not so severe as that suffered by the appellant, and presenting in general certain characteristic features, in particular, bullae or blisters and symmetrical grouping of the inflammatory features, which were never present in the appellant. Dr. Wigley, a very eminent dermatologist, who examined the appellant, and as an expert gave evidence in support of the doctors who actually attended him, expressed his opinion that all dermatitis had an external origin, but whether he was right in this or not, he was confident that in the appellant's case the origin of the disease was external, and on all the evidence their Lordships accept this view.

But then it was said that the disease may have been contracted by the appellant from some external irritant the presence of which argued no imperfection in the garments, but which only did harm because of the appellant's peculiar susceptibility. Thus the disease might have been initiated by the mechanical irritation of the wool itself, or if it was due to some chemical ingredient in the garments, that might have been something in itself harmless, either because of its character or because of the actual quantity in which it was present, so that the mischief was attributable to the appellant's own physical defect and not to any defect in the garments; the respondents, it was said, could not be held responsible for anything in the garments which would not be harmful in normal use. Two issues were thus involved; one, was the appellant's skin normal? and the other, was there in the garments, or any part of them, a detrimental quantity of any mischievous chemical?

The Chief Justice held that the appellant's skin was normal. He had habitually up to the material time worn woollen undergarments without inconvenience; that he was not sensitive to the mechanical effects of wool seemed to be proved by an experiment of his doctors, who placed a piece of scoured wool on a clear area on his skin and found, after a sufficient interval, no trace of irritation being produced. It was said that he had suffered from tuberculosis some years before, and that the disease had merely been arrested, not eliminated, and it was then said that tuberculosis made the patient more susceptible to skin disease, because it weakens the resistance of the skin and lowers the patient's vitality. But this contention did not appear to be established. It was admitted that the appellant's skin had by reason of his illness become what is denominated "allergic," that is, unduly sensitized to the particular irritant from which he had suffered; but that could throw no light on the original skin condition. A point was made that a skin ordinarily normal might transiently and unexpectedly show a peculiar sensitivity, but

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that remained a mere possibility which was not developed and may be ignored. In the result there does not seem any reason to differ from the Chief Justice's finding that the appellant's skin was normal.

What then caused this terrible outbreak of dermatitis? The place and time of the original infection would seem to point to the cause being something in the garments, and in particular to something in the ankle ends of the underpants, because the inflammation began at the front of the shins where the skin is drawn tight over the bone, and where the cuff of the pants presses tightly under the socks against the skin, and began about nine or ten hours after the pants were first put on. The subsequent virulence and extension of the disease may be explained by the toxins produced by the inflammation getting into the blood stream. But the coincidence, it was pointed out, was not sufficient proof in itself that the pants were the cause. The appellant then relied on the fact that it was admitted in the respondents' answers to interrogatories that the garments, when delivered to the retailer by the manufacturers, contained sulphur dioxide, and on the fact that the presence of sulphur dioxide indicated the presence of free sulphites in the garment. If there were in a garment worn continuously all day next the skin free sulphites in sufficient quantities, a powerful irritant would be set in operation. Sweat is being slowly and continuously secreted by the skin, and combines with the free sulphites to form successively sulphur dioxide, sulphurous acid and sulphuric acid: sulphuric acid is an irritant which would produce dermatitis in a normal skin if applied in garments under the conditions existing when the appellant wore the underpants. It is a fair deduction from the answers and from the evidence that free sulphites were present in quantities not to be described as small, but that still left the question whether they were present in quantities sufficient to account for the disease.

It is impossible now, and was impossible at any time after the garments were washed, to prove what quantities were present when the garments were sold. That can only be inferred from various considerations. The garments were handed back to the retailers in July, 1931, and by them sent back to the manufacturers. In November, 1931, Mr. Anderson, of Victoria, an analytical chemist, on the instructions of the manufacturers analysed one-half of one of the pants to ascertain what quantity of water soluble salts they contained, and found certain quantities of sulphates, but sulphates would not irritate the skin. In the following May, Mr. Anderson made a further analysis of the other three garments and of the remaining half of the pair of pants : he was testing for sulphites, which he expressed in terms of sulphur dioxide percentage by weight. In one singlet he found a nil return, in the other ·0070 ; in the pants he found ·0082 in one and ·0201 in the other. There was some debate whether these figures were of free sulphites, or of sulphites adherent to the wool molecule, and not soluble by sweat. Their Lordships, after careful consideration and for a variety of reasons, do not differ from the conclusion of the Chief Justice that these results proved the presence of free sulphite. But the results were not such as to show quantities likely to cause irritation. On the other hand, a very eminent scientist, Professor Hicks, called by the appellant, gave his opinion that the garments before washing must have had sulphites in considerably greater quantity : and these tests of Mr. Anderson were of each garment as a whole, whereas it was clear that the relevant parts in each pair of pants were the ankle ends, since the disease was initiated at that point in each leg. It is clear that no further light could be thrown by fresh analysis of the actual garments.

Evidence was given on behalf of the manufacturers as to the processes used in the manufacture of these garments. The webs of wool were put through six different processes : of these the second, third and fourth, were the most significant for this case. The second was for shrinking, and involved treatment of the web with a solution of calcium hypochloride and hydrochloric acid. The third process was to remove these chemicals by a solution of bisulphite of soda, and the fourth process was to neutralize the bisulphite by means of bicarbonate of soda; the fifth process was for washing, and the sixth was a drying and finishing process. If the fourth process did not neutralize the added bisulphite, free sulphites would remain, which the subsequent washing might not entirely remove. The manufacturers' evidence was that the process was properly applied to the wool from which these garments were made, and if properly applied was bound to be effective. The foreman scourer, Smith, was not called at the trial, where his absence was made matter of comment, but Ashworth, one of the scourers, gave evidence and, among other things, said that they had to be very careful that there was no excess of one chemical or the other. If there were an excess of some sort or the other, it would be bound to be somebody's fault. The washing off was to clear out as much of the traces of the previous process as possible. But something might go wrong, some one might be negligent, and as a result some bisulphite of soda which had been introduced might not have been got rid of. The cuffs of the pants were ribbed and were made of a different web separately treated. The appellant's advisers had at the trial no independent information as to the actual process adopted in respect of these garments, or even when they were made, and, by petition, they asked for leave to adduce further evidence which would go to show, as they suggested, that the process deposed to was not adopted by the manufacturers until after June 3, 1931. Their Lordships, however, feel themselves in a position to dispose of the appeal on the evidence as it stands, taking due account of the fact that the manufacturers' secretary was called and deposed that in the previous six years the manufacturers had treated by a similar process 4,737,600 of these garments, which they had sold to drapers throughout Australia, and he had no recollection of any complaints, which, if made, would in ordinary course have come under his notice. Dr. Hargreaves, an analytical chemist, on the instructions of the manufacturers analysed specimen garments, subjecting them to tests which would extract any sulphur adherent to the wool as well as free sulphites, if any were present, and found only negligible quantities. Against this evidence was that of Professor

Hicks, who agitated in unheated water for two minutes a singlet of the manufacturers' Golden Fleece make, purchased in November, 1932, and found that the aqueous extract contained a percentage by weight of sulphite of ·11, which, in his opinion, was free in the fabric and readily soluble in cold water. The significance of this experiment seems to be that however well designed the manufacturers' proved system may be to eliminate deleterious substances it may not invariably work according to plan. Some employee may blunder.

Mr. Greene, for the respondents, quite rightly emphasized how crucial it would have been for the appellant's case to prove, by positive evidence, that in fact the garments which the appellant wore contained an excess of free sulphites. He contended that the appellant's case involved arguing in a circle; his argument, he said, was that the garments must have caused the dermatitis because they contained excess sulphites, and must have contained excess sulphites because they caused the disease: but nought, he said, added to nought still is no more than nought. This, however, does not do justice either to the process of reasoning by way of probable inference which has to do so much in human affairs, or to the nature of circumstantial evidence in law courts. Mathematical, or strict logical, demonstration is generally impossible: juries are in practice told that they must act on such reasonable balance of probabilities as would suffice to determine a reasonable man to take a decision in the grave affairs of life. Pieces of evidence, each by itself insufficient, may together constitute a significant whole, and justify by their combined effect a conclusion. Dixon J., in the judgment in which he dissented from that of the Chief Justice, does not seem to suggest that there was no evidence for a decision in the appellant's favour, but merely that it was not safe so to decide. But the coincidences of time and place, and the absence of any other explanation than the presence of free sulphite in the garments, point strongly in favour of the appellant's case. It is admitted, as has been said above, that some sulphites were present in the garments,

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and there is nothing to exclude the possibility of a quantity sufficient to do the harm. On the whole, there does not seem adequate reason to upset the judgment on the facts of the Chief Justice. No doubt this case depends in the last resort on inferences to be drawn from the evidence, though on much of the detailed evidence the trial judge had the advantage of seeing and hearing the witnesses. The plaintiff must prove his case, but there is an onus on a defendant who, on appeal, contends that a judgment should be upset: he has to show that it is wrong. Their Lordships are not satisfied in this case that the Chief Justice was wrong.

That conclusion means that the disease contracted, and the damage suffered by the appellant, were caused by the defective condition of the garments which the retailers sold to him, and which the manufacturers made and put forth for retail and indiscriminate sale. The Chief Justice gave judgment against both respondents, against the retailers on the contract of sale, and against the manufacturers in tort, on the basis of the decision in the House of Lords in *Donoghue* v. *Stevenson*. (1) The liability of each respondent depends on a different cause of action, though it is for the same damage. It is not claimed that the appellant should recover his damage twice over; no objection is raised on the part of the respondents to the form of the judgment, which was against both respondents for a single amount.

So far as concerns the retailers, Mr. Greene conceded that if it were held that the garments contained improper chemicals and caused the disease, the retailers were liable for breach of implied warranty, or rather condition, under s. 14 of the South Australia Sale of Goods Act, 1895, which is identical with s. 14 of the English Sale of Goods Act, 1893. The section is in the following terms:—

"14. Subject to the provisions of this Act, and of any Statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—

I. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

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(1) [1932] A. C. 562.

II. Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

III. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

IV. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

He limited his admission to liability under exception (ii.), but their Lordships are of opinion that liability is made out under both exception (i.) and exception (ii.) to s. 14, and feel that they should so state out of deference to the conflicting views expressed in the Court below. Sect. 14 begins by a general enunciation of the old rule of caveat emptor, and proceeds to state by way of exception the two implied conditions by which it has been said the old rule has been changed to the rule of caveat venditor: the change has been rendered necessary by the conditions of modern commerce and trade. The section has been recently twice discussed by the House of Lords, once in *Medway Oil and Storage Co.* v. *Silica Gel Corporation* (1) and again in *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.* (2) There are numerous cases on the section,

(1) 33 Com. Cas. 195.

(2) [1934] A. C. 402.

but as these were cited below it is not necessary to detail them again. The first exception, if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller "so as to show that the buyer relies on the seller's skill or judgment." It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question, of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment: the retailer need know nothing about the process of manufacture: it is immaterial whether he be manufacturer or not: the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make: the goods sold must be, as they were in the present case, goods of a description which it is in the course of the seller's business to supply: there is no need to specify in terms the particular purpose for which the buyer requires the goods, which is none the less the particular purpose within the meaning of the section, because it is the only purpose for which any one would ordinarily want the goods. In this case the garments were naturally intended, and only intended, to be worn next the skin. The proviso does not apply to a case like the sale of Golden Fleece make such as is here in question, because Golden Fleece is neither a patent nor a trade name within the meaning of the proviso to exception (i.). With great deference to Dixon J., their Lordships think that the requirements of exception (i.) were complied with. The conversation at the shop in which the appellant discussed questions of price and of the different makes did not affect the fact that he was substantially relying on the retailers to supply him with a correct article.

The second exception in a case like this in truth overlaps in its application the first exception; whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination: that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make. The appellant was satisfied by the appearance of the underpants; he could not detect, and had no reason to suspect, the hidden presence of the sulphites: the garments were saleable in the sense that the appellant, or any one similarly situated and who did not know of their defect, would readily buy them: but they were not merchantable in the statutory sense because their defect rendered them unfit to be worn next the skin. It may be that after sufficient washing that defect would have disappeared; but the statute requires the goods to be merchantable in the state in which they were sold and delivered; in this connection a defect which could easily be cured is as serious as a defect that would not yield to treatment. The proviso to exception (ii.) does not apply where, as in this case, no examination that the buyer could or would normally have made would have revealed the defect. In effect, the implied condition of being fit for the particular purpose for which they are required, and the implied condition of being merchantable, produce in cases of this type the same result. It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations.

The retailers, accordingly, in their Lordships' judgment are liable in contract: so far as they are concerned, no question of negligence is relevant to the liability in contract.

But when the position of the manufacturers is considered, different questions arise: there is no privity of contract between the appellant and the manufacturers: between them the liability, if any, must be in tort, and the gist of the cause of action is negligence. The facts set out in the foregoing show, in their Lordships' judgment, negligence in manufacture. According to the evidence, the method of manufacture was correct: the danger of excess sulphites being left was recognized and was guarded against: the process was intended to be fool proof. If excess sulphites were left in the garment, that could only be because some one was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances: even if the manufacturers could by apt evidence have rebutted that inference they have not done so.

On this basis, the damage suffered by the appellant was caused in fact (because the interposition of the retailers may for this purpose in the circumstances of the case be disregarded) by the negligent or improper way in which the manufacturers made the garments. But this mere sequence of cause and effect is not enough in law to constitute a cause of action in negligence, which is a complex concept, involving a duty as between the parties to take care, as well as a breach of that duty and resulting damage. It might be said that here was no relationship between the parties at all: the manufacturers, it might be said, parted once and for all with the garments when they sold them to the retailers, and were therefore not concerned with their future history, except in so far as under their contract with the retailers they might come under some liability: at no time, it might be said, had they any knowledge of the existence of the appellant: the only peg on which it might be sought to support a relationship of duty was the fact that the appellant had actually worn the garments, but he had done so because he had acquired them by a purchase from the retailers, who were at that time the owners of the goods by a sale which had vested the property in the retailers and divested both property and control from the manufacturers. It was said there could be no legal relationships in the matter save those under the two contracts between the respective parties to those contracts, the one between the manufacturers and the retailers and the other between the retailers and the appellant. These contractual relationships (it might be said) covered the whole field and excluded any question of tort liability: there was no duty other than the contractual duties.

This argument was based on the contention that the present case fell outside the decision of the House of Lords in *Donoghue's* case. (1) Their Lordships, like the judges in the Courts in Australia, will follow that decision, and the only question here can be what that authority decides and whether this case comes within its principles. In *Donoghue's* case (1) the defendants were manufacturers of ginger-beer, which they bottled: the pursuer had been given one of their bottles by a friend who had purchased it from a retailer who in turn had purchased from the defendants. There was no relationship between pursuer and defenders except that arising from the fact that she consumed the ginger-beer they had made and bottled. The bottle was opaque, so that it was impossible to see that it contained the decomposed remains of a snail: it was sealed and stoppered so that it could not be tampered with until it was opened in order that the contents should be drunk. The House of Lords held these facts established in law a duty to take care as between the defenders and the pursuer.

Their Lordships think that the principle of the decision is summed up in the words of Lord Atkin (2):

" A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the

(1) [1932] A. C. 562.

(2) Ibid. 599.

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consumer's life or property, owes a duty to the consumer to take that reasonable care."

This statement is in accord with the opinions expressed by Lord Thankerton and Lord Macmillan, who in principle agreed with Lord Atkin.

In order to ascertain whether the principle applies to the present case, it is necessary to define what the decision involves, and consider the points of distinction relied upon before their Lordships.

It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists. In *Donoghue's* case (1) the duty was deduced simply from the facts relied on—namely, that the injured party was one of a class for whose use, in the contemplation and intention of the makers, the article was issued to the world, and the article was used by that party in the state in which it was prepared and issued without it being changed in any way and without there being any warning of, or means of detecting, the hidden danger: there was, it is true, no personal intercourse between the maker and the user; but though the duty is personal, because it is inter partes, it needs no interchange of words, spoken or written, or signs of offer or assent; it is thus different in character from any contractual relationship; no question of consideration between the parties is relevant: for these reasons the use of the word "privity" in this connection is apt to mislead, because of the suggestion of some overt relationship like that in contract, and the word "proximity" is open to the same objection; if the term "proximity" is to be applied at all, it can only be in the sense that the want of care and the injury are in essence directly and intimately connected; though there may be intervening transactions of sale and purchase, and intervening handling between these two events, the events are themselves unaffected by what happened between them: "proximity" can only properly be used to exclude any element of remoteness, or of some interfering complication between the want of care and the injury, and like "privity" may mislead by introducing alien ideas. Equally also may the word "control" embarrass, though it is conveniently used in the opinions in *Donoghue's* case (1) to emphasize the essential factor that the consumer must use the article exactly as it left the maker, that is in all material features, and use it as it was intended to be used. In that sense the maker may be said to control the thing until it is used. But that again is an artificial use, because, in the natural sense of the word, the makers parted with all control when they sold the article and divested themselves of possession and property. An argument used in the present case based on the word "control" will be noticed later.

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(1) [1932] A. C. 562, 599.

It is obvious that the principles thus laid down involve a duty based on the simple facts detailed above, a duty quite unaffected by any contracts dealing with the thing, for instance, of sale by maker to retailer, and again by retailer to consumer or to the consumer's friend.

It may be said that the duty is difficult to define, because when the act of negligence in manufacture occurs there was no specific person towards whom the duty could be said to exist: the thing might never be used: it might be destroyed by accident, or it might be scrapped, or in many ways fail to come into use in the normal way: in other words the duty cannot at the time of manufacture be other than potential or contingent, and only can become vested by the fact of actual

(1) [1932] A. C. 562, 599.

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use by a particular person. But the same theoretical difficulty has been disregarded in cases like *Heaven* v. *Pender* (1), or in the case of things dangerous per se or known to be dangerous, where third parties have been held entitled to recover on the principles explained in *Dominion Natural Gas Co., Ld.* v. *Collins & Perkins*. (2) In *Donoghue's* case (3) the thing was dangerous in fact, though the danger was hidden, and the thing was dangerous only because of want of care in making it; as Lord Atkin points out in *Donoghue's* case (3), the distinction between things inherently dangerous and things only dangerous because of negligent manufacture cannot be regarded as significant for the purpose of the questions here involved.

One further point may be noted. The principle of *Donoghue's* case (3) can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.

If the foregoing are the essential features of *Donoghue's* case (3), they are also to be found, in their Lordships' judgment, in the present case. The presence of the deleterious chemical in the pants, due to negligence in manufacture, was a hidden and latent defect, just as much as were the remains of the snail in the opaque bottle: it could not be detected by any examination that could reasonably be made. Nothing happened between the making of the garments and their being worn to change their condition. The garments were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by the appellant: it was not contemplated that they should be first washed. It is immaterial that the appellant has a claim in contract against the retailers, because that is a quite independent cause of action, based on different considerations, even though the damage may be the same. Equally irrelevant is any question of liability between the retailers and the manufacturers on the contract of sale between them. The tort liability is independent of any question of contract.

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(1) 11 Q. B. D. 503.
(2) [1909] A. C. 640.
(3) [1932] A. C. 562, 583, 595.

It was argued, but not perhaps very strongly, that *Donoghue's* case (1) was a case of food or drink to be consumed internally, whereas the pants here were to be worn externally. No distinction, however, can be logically drawn for this purpose between a noxious thing taken internally and a noxious thing applied externally: the garments were made to be worn next the skin: indeed Lord Atkin (1) specifically puts as examples of what is covered by the principle he is enunciating things operating externally, such as " an ointment, a soap, a cleaning fluid or cleaning powder."

Mr. Greene, however, sought to distinguish *Donoghue's* case (1) from the present on the ground that in the former the makers of the ginger-beer had retained " control " over it in the sense that they had placed it in stoppered and sealed bottles, so that it would not be tampered with until it was opened to be drunk, whereas the garments in question were merely put into paper packets, each containing six sets, which in ordinary course would be taken down by the shopkeeper and opened, and the contents handled and disposed of separately, so that they would be exposed to the air. He contended that though there was no reason to think that the garments when sold to the appellant were in any other condition, least of all as regards sulphur contents, than when sold to the retailers by the manufacturers, still the mere possibility and not the fact of their condition having been changed was sufficient to distinguish *Donoghue's* case (2): there was no " control " because nothing was done by the manufacturers to exclude the possibility of any tampering while the goods were on their way to the user. Their Lordships do not accept that contention. The decision in *Donoghue's* case (2) did not depend on the bottle being stoppered and sealed: the essential point in this regard was that the article should reach the consumer or user subject to the same defect

(1) [1932] A. C. 562, 583, 595.

(2) Ibid. 562, 591.

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as it had when it left the manufacturer. That this was true of the garment is in their Lordships' opinion beyond question. At most there might in other cases be a greater difficulty of proof of the fact.

Mr. Greene further contended on behalf of the manufacturers that if the decision in *Donoghue's* case (1) were extended even a hair's-breadth, no line could be drawn, and a manufacturer's liability would be extended indefinitely. He put as an illustration the case of a foundry which had cast a rudder to be fitted on a liner: he assumed that it was fitted and the steamer sailed the seas for some years: but the rudder had a latent defect due to faulty and negligent casting, and one day it broke, with the result that the vessel was wrecked, with great loss of life and damage to property. He argued that if *Donoghue's* case (1) were extended beyond its precise facts, the maker of the rudder would be held liable for damages of an indefinite amount, after an indefinite time, and to claimants indeterminate until the event. But it is clear that such a state of things would involve many considerations far removed from the simple facts of this case. So many contingencies must have intervened between the lack of care on the part of the makers and the casualty that it may be that the law would apply, as it does in proper cases, not always according to strict logic, the rule that cause and effect must not be too remote: in any case the element of directness would obviously be lacking. Lord Atkin deals with that sort of question in *Donoghue's* case (1), where he refers to *Earl* v. *Lubbock* (2): he quotes the common-sense opinion of Mathew L.J.: "It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on."

In their Lordships' opinion it is enough for them to decide this case on its actual facts.

No doubt many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the Courts for decision. It is enough now to

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(1) [1932] A. C. 562, 591.
(2) [1905] 1 K. B. 253, 259.

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say that their Lordships hold the present case to come within the principle of *Donoghue's* case (1), and they think that the judgment of the Chief Justice was right in the result and should be restored as against both respondents, and that the appeal should be allowed, with costs here and in the Courts below, and that the appellant's petition for leave to adduce further evidence should be dismissed, without costs.

They will humbly so advise his Majesty.

Solicitors for appellant: *Roney & Co.*
Solicitors for respondents: *Broad & Son.*

[PRIVY COUNCIL.]

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NORTHWESTERN UTILITIES, LIMITED, APPELLANTS;

AND

LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

Canada (Alberta)—Negligence—Damages—Gas main—Excavation work by Local Authority beneath main—Leakage of gas—Building destroyed by fire—Failure of Gas Company to inspect city's operations—Breach of duty—Liability for loss—"Locate and Construct"—Water, Gas, Electric and Telephone Companies Act, R. S. A., 1922, *c.* 168, *s.* 13.

A hotel belonging to and insured by the respondents respectively was destroyed by fire caused by the escape and ignition of natural gas which percolated through the soil and penetrated into the hotel basement from a fractured welded joint in a 12-in. intermediate pressure main, 3 ft. 6 ins. below the street level, belonging to the appellants, a public utility company who supplied natural gas to consumers in the City of Edmonton, Alberta.

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(1) [1932] A. C. 562.

* *Present:* VISCOUNT HAILSHAM L.C., LORD BLANESBURGH, and LORD WRIGHT.

The cause of the break in the welded joint through which the gas leaked was found to be the operations of the City of Edmonton in constructing a storm sewer, involving underground work immediately beneath the appellants' main. On a claim for damages by the respondents against the appellants :—

Held, that the words "locate and construct" in s. 13 of the Alberta Water, Gas, Electric and Telephone Companies Act, 1922, refer only to the initial location or construction of the works, and do not include "maintain," and that the appellants were not subject to the rule of strict or absolute liability, but were entitled to the protection accorded to persons acting under statutory authority.

Raffan v. *Canadian Western Natural Gas Light, Heat and Power Co.* (1914) 7 A. L. R. 459; 8 W. W. R. 676 disapproved on that point.

But *held*, that as the appellants were carrying gas at high pressure which was very dangerous, if it should escape, they owed a duty to the owners of the hotel, to exercise reasonable care and skill that the owners should not be damaged. The degree of care which that duty involved must be proportioned to the degree of risk involved. The City might at any time be conducting operations in connection with their sewers in the vicinity of the appellants' mains, and it was the duty of the appellants to watch such operations.

The operations in question were, from their public nature and conspicuous character and from the time during which they went on, such that a failure by the appellants to know of them was plainly not consistent with due care on their part in the interests of members of the public likely to be affected.

Although under the exception to the rule in *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, the appellants would not be liable for damages caused, without default on their part, by the independent, conscious act of a third party, they were negligent in failing to foresee and guard against the consequences to their works of the City's operations.

Rylands v. *Fletcher* (1868) L. R. 3 H. L. 330; and *Box* v. *Jubb* (1879) 4 Ex. D. 76 considered.

Judgment of the Supreme Court of Alberta (Appellate Division) (1935) 1 D. L. R. 135; (1934) 3 W. W. R. 641 affirmed.

APPEAL (No. 27 of 1935) from a judgment of the Supreme Court of Alberta (Appellate Division) (December 6, 1934) reversing by a majority a judgment of Ford J. (February 27, 1934).

The respondents, the London Guarantee and Accident Co., Ld., and others, brought an action against the appellants, Northwestern Utilities, Ld., claiming amounts totalling $320,278.64 as damages which they alleged they had suffered as the result of a fire which occurred on the night of February 21, 1932, and destroyed the Corona Hotel, Jasper Avenue, Edmonton, Alberta, of which the above named respondents were the owners and the other respondents insurers.

The question was whether the appellants, who supply natural gas to the inhabitants of Edmonton, were responsible for the damage resulting from a fire caused by the escape of natural gas from one of their mains, which the appellants alleged had not occurred as the result of any negligence on their part.

The facts appear from the judgment of the Judicial Committee.

Ford J. dismissed the respondents' claim. An appeal to the Appellate Division of the Supreme Court of Alberta (Harvey C.J.A., Clarke and McGillivray J.J.A., Mitchell and Lunney J.J.A. dissenting) was allowed, and judgment ordered to be entered for the respondents for damages to be assessed. The appeal is reported at (1935) 1 D. L. R. 135; (1934) 3 W. W. R. 641.

1935. July 25, 26, 29, 30; Aug. 1. *Wilfrid Greene K.C.* and *G. H. Steer K.C.* (of the Alberta Bar) for the appellants. The plaintiffs alleged that the breaking of the main was due to our negligence; we say that it was due to the City of Edmonton's negligence in the way they conducted operations in connection with sewer works, and that we were not negligent at all. Reference was made to the Water, Gas, Electric and Telephone Companies Act, R. S. A., 1922, c. 168, ss. 2, 13, and to *Raffan* v. *Canadian Western Natural Gas Light, Heat and Power Co.* (1) That case held that the words "locate and construct" in s. 11 of c. 103 of the Water and Gas Companies Ordinance, 1901, involved maintaining. That decision was not right on that point. Reference was made to the Edmonton Natural Gas Franchise Act, 1916, c. 29. There was ample evidence to support the finding of fact in favour of the appellants. They had no constructive notice

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(1) (1914) 7 A. L. R. 459; 8 W. W. R. 676.

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of any operations by the City. The appellant company, being a public utility company, authorized and required by statute to maintain the gas distribution system in the City, was exempt from liability save in the case of negligence: see *Green* v. *Chelsea Waterworks Co.* (1) Companies of this kind do not come within *Rylands* v. *Fletcher* (2), but the Courts below held that s. 13 of R. S. A., 1922, c. 168, brings *Rylands* v. *Fletcher* (2) back again. The following three authorities dealt with the statutory reintroduction of *Rylands* v. *Fletcher* (2):—*Midwood & Co., Ld.* v. *Manchester Corporation.* (3); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (4) [LORD BLANESBURGH: That means that in a case of this kind you have all the defences in *Rylands* v. *Fletcher* (2) open to you]; *Manchester Corporation* v. *Farnworth* (5) A nuisance is not held to have been caused by a defendant if he affirmatively establishes that it was caused by the malicious act of a third party which the defendant was not under a duty to guard against: *Charing Cross, West-End and City Electricity Supply Co.* v. *London Hydraulic Power Co.* (6) *Raffan's* case (7) was distinguishable from the *Charing Cross* case (6), in that case there was no question of the intervention of a third party. Sect. 13 of R. S. A., 1922, c. 168, did not apply at all to anything apart from location and construction. It was not a section similar to nuisance clauses. Assuming that s. 13 applies, it only applied during the period of location and construction of the appellants' undertaking, and the highest possible liability that it could impose on the appellants was the *Rylands* v. *Fletcher* (2) liability. The section could not put the appellants in a worse position than they would be in at common law, and could not make them liable in damages without proof of negligence. *Hammond* v. *Vestry of St. Pancras* (8) and *Stretton's Derby Brewery Co.* v. *Mayor of Derby* (9) were authorities for the proposition that sections of the nature of s. 13

(1) (1894) 70 L. T. 547.
(2) L. R. 3 H. L. 330.
(3) [1905] 2 K. B. 597.
(4) [1914] 3 K. B. 772, 778–9.
(5) [1930] A. C. 171.
(6) [1913] 3 K. B. 442, 449.
(7) (1914) 7 A. L. R. 459; 8 W. W. R. 676.
(8) (1874) L. R. 9 C. P. 316.
(9) [1894] 1 Ch. 431.

must not be approached with the idea that absolute liability will be found. Reference was also made to *Salt* v. *Town of Cardston* (1), and to *Rickards* v. *Lothian* (2): the appellants having no control over the operations of the City, and having no reason to apprehend any danger, *Rylands* v. *Fletcher* (3) even if it applied to them, would not impose liability on them. There was no evidence on which it could be found that the appellants ought reasonably to have known what the City were doing, and to have assumed that the effect of what they were doing would endanger the gas main. *Daniel* v. *Directors, etc., of Metropolitan Ry. Co.* (4) was an authority for the proposition that you are entitled to assume that those doing work alongside your property will do everything properly, and it is no part of your duty to assume that they are going to do something that they ought not to do. The imposition of a duty of that kind would be intolerable.

Tilley K.C., *Woods K.C.* (both of the Alberta Bar), and *Frank Gahan* for the respondents. We appealed first against the finding of the trial judge that there was no negligence in the construction of the appellants' system. There were two confirmed findings of fact to the effect that the appellants knew or ought to have known of the work being carried on by the City; that in the circumstances the appellants should have anticipated what in fact happened, and they were liable. Sects. 11 and 13 of the Water, Gas, etc., Act, 1922, were both binding on, and imposed an obligation on the appellants, and put a very heavy burden on them if they did injury. The appellants should have known what work the City was doing. Had they examined into the work they would have found that excavation work was being done by the City under their gas main. The appellants had a duty to the public to see what was going on, and, if it was likely to bring evil consequences, to see that steps were taken to prevent that result. The work which was being done by the City—without suggesting that it was improperly or negligently done—was apt to produce those consequences, and there

(1) (1920) 60 S. C. R. (Canada) 612.
(2) [1913] A. C. 263, 274.
(3) L. R. 3 H. L. 330.
(4) (1871) L. R. 5 H. L. 45, 54.

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should have been a support. There was no obligation for a support as against the City who had a paramount right. The appellants made no efforts to fulfil the duty which was on them. Sects. 11, 13 and 14 of the Act of 1922 placed a definite obligation on the appellant company with reference to damage caused to buildings in or about the execution of their powers. Reference was made to *Toronto Corporation* v. *Toronto Ry. Co.* (1) The right to maintain mains and conduct gas through them must be found in R. S. A., 1922, c. 168, and ss. 10-14 must be read as applying to authorized and operating companies. Reference was also made to *Hammond* v. *Vestry of St. Pancras* (2), and to *Stretton's Derby Brewery Co.* v. *Mayor of Derby.* (3) The defendants had not satisfied the onus that rested on them of establishing that they had taken all necessary steps to avoid a pipe breaking. In such circumstances as the present the appellants should have ascertained if there were danger, and something to be guarded against, and if there was it became their duty to guard against its possible effects: *Tarry* v. *Ashton.* (4) On the question of onus see also *Dominion Natural Gas Co., Ld.* v. *Collins and Perkins.* (5) Reference was also made to *M'Alister* (*or Donoghue*) v. *Stevenson.* (6) There was nothing in the Act which authorized a nuisance, rather the contrary was suggested. The Statute requires compensation for damage to property irrespective of any question of negligence. Referred to *Rickards* v. *Lothian,* (7) and to *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (8) A public utility company allowing its gas to escape created a nuisance and fell within the principle of *Rylands* v. *Fletcher.* (9) What had happened here was not an act which had been done intentionally and deliberately in the sense that there was a direct liability. It was an indirect action having an indirect effect: see *Hardaker* v. *Idle District Council.* (10) The case cannot be put into the category of injury resulting from another's volition, and cannot be brought within the exceptions to *Rylands* v. *Fletcher*. (1) If the appellants let that strong, dangerous gas escape they are responsible. To come within the exception there must be some intentional act, and the act of the City in this case could not be said to be a malicious act. No case had gone the length of upholding that in a case such as the present the act of the City could be regarded in any way as a conscious act, and if the matter is left debatable then the defendants have not established the conscious act. Though the duty was raised to guard and protect, the appellants had not done a thing by way of attempt to perform the duty.

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(1) [1916] 2 A. C. 542.
(2) L. R. 9 C. P. 316, 322–3.
(3) [1894] 1 Ch. 431, 442.
(4) (1876) 1 Q. B. D. 314, 319.
(5) [1909] A. C. 640, 643, 647.
(6) [1932] A. C. 562, 568.
(7) [1913] A. C. 263, 268, 273–4, 276–7.
(8) [1914] 3 K. B. 772, 781.
(9) L. R. 3 H. L. 330.
(10) [1896] 1 Q. B. 335.

Greene K.C. replied. With regard to the alleged duty of the Gas company in respect of the City's operations he did not know why the company should have anticipated any works that would disturb their mains without their being informed of the fact by the people doing it. The whole case of knowledge against them involved the assumption that somebody in their employment saw or ought to have seen things on the surface, and ought to have inferred from that the actual nature, dimensions and position of the underground work. No Court ought to draw an inference of that kind. There was no right in the gas company to ask the City for any details whatsoever of what was being done. If it had inquired in a friendly way the answer would have been, " you need not worry, nothing we are doing will hurt you."

Oct. 24. The judgment of their Lordships was delivered by

Lord Wright. The action out of which this appeal arises was brought by the respondents as respectively owners of property in the City of Edmonton, in Alberta, and their insurers. They claimed that the property had been destroyed or damaged by fire due to an escape of gas from the gas main of the appellants for which the appellants are liable. The damages claimed amounted to $320,278.64, but all questions of amount were reserved. On the question of

(1) L. R. 3 H. L. 330.

liability the appellants succeeded before Ford J., but his decision was reversed by a judgment of the Supreme Court of Alberta (Appellate Division) by a majority (Lunney and Mitchell JJ.A. dissenting), who ordered judgment to be entered for damages to be assessed. From that judgment, the present appeal is brought.

The appellants are a public utility company incorporated under the Dominion Companies Act: they distribute natural gas under a franchise granted to their predecessors in title, the Northern Alberta Natural Gas Development Co., Ld. (hereinafter called "the company") by the City of Edmonton (hereinafter called "the City") in November, 1915, and confirmed by statute (Alberta Statutes, 1916, c. 29). The franchise was assigned to the appellants by deed dated May 29, 1923.

Under this franchise, the City granted to the company the full power to pull down, take up, repair, maintain or operate its gas pipe lines along, through or under the streets and other public places within the City for the purpose of supplying natural gas to consumers, with power to break up the surface and make necessary excavations for that purpose. By clause 11 it was provided that the company should indemnify the City against any damages arising out of the construction and operation of its works, owing to the negligence of the company, its servants and employees, and that the City should be liable for all damage to the plant of the company caused by the negligence of the City, its workmen and employees. The company was bound to supply natural gas as required to consumers within the City limits at the property line when their land or premises were situated along the company's main line. The franchise was subject to the provisions of the Water, Gas, Electric and Telephone Companies Act of Alberta which, by amendment made in 1924, was applied to companies incorporated or licensed under any statute of the Dominion or of Alberta. It is convenient to recite here ss. 11 and 13 of that Act. Sect. 11 was in these terms: "The Company shall make satisfaction to the owners or proprietors of any building or other property or to the Municipality or Minister of Public Works as the case may be for all damages caused in or by the execution of all or any of the said powers."

By s. 13 it was provided as follows: "The Company shall locate and construct its gas or water works or electric or telephone system and all apparatus and appurtenances thereto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety."

The appellants in August, 1923, laid a 12-inch intermediate pressure gas main along a lane in Edmonton south of Jasper Avenue, and running at right angles into 107th Street; the lane was unpaved, but where the main went across and under the street an open trench could not be cut; the width of the street was 77 feet, and three excavations were made, one at each end about 7 feet from the side pavement and one in the middle, spaces of about 11 feet being left in the street for the traffic, the two intervening spaces being tunnelled. Each excavation was about 15 feet wide. The main was laid at a depth of 3 feet 6 inches: in the pipe were three welded joints, the one in the centre being in the space of the middle excavation: the pipe was pushed or pulled through the length of the tunnelled and excavated spaces, the earth being back-filled. Not far from this main, and about the same level below the ground, the appellants also laid a low pressure 10-inch main. There was also a wooden conduit laid by the City to contain the cables for the street railway. In 1907, the City built as part of its sewerage system in 107th Street a manhole called manhole A; the manhole was 16 feet deep and was close to the appellants' two mains. Later, between February and April, 1931, the City proceeded to construct a storm sewer system in the same region. For this purpose they excavated a manhole, called manhole B, to the north-east of manhole A, and about 20 feet away, and they dug a trench further to the north or north-east and there they laid a 15-inch storm sewer: in addition they drove a tunnel underground for the 20 feet from manhole B to manhole A, and laid a storm sewer in the tunnel; in order

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to join that sewer with manhole A they built a weir chamber, roughly about 4 ft. cube, at the bottom of manhole A, the wall of which at the bottom they had broken so as to build the chamber and join up the storm sewer. These underground building operations were immediately beneath the appellants' main and in the way of the centre welded joint. They were carried out from manhole A.

In February, 1932, it was discovered that gas from the appellants' system was escaping into the Corona Hotel, which belonged to one of the respondents. The gas ignited and the hotel was burned down and adjoining property was damaged. It was ascertained on examination that the centre welded joint of the pipe line of the appellants' 12-inch main had given way; the pipe in that vicinity had sagged 6½ inches. Hence the escape of gas which had percolated through the soil and penetrated into the hotel basement. The claim was in respect of the loss and damage through the fire. The claim against the appellants was based in the pleadings on various causes of action: (i) for permitting gas, a dangerous substance, to escape; (ii) for breach of s. 13 of the Water, Gas, etc., Act; (iii) for nuisance public or private; (iv) for negligence in construction and maintenance of the system, or in failing to have an inspection system, or in failing to odorise their gas, or in failing to locate their pipes below the frost line, or to repair and maintain their pipes. The main defence of the appellants was that the breaking of the joint in the pipe was solely due to the action of the City in letting down the soil under the pipe by the negligent and improper way in which they excavated the weir chamber and tunnel under the appellants' main, without providing adequate support. The respondents' case originally was that the City's work had been properly designed and carried out, so that there could be no reason at any time, either while it was being carried on or at any subsequent period, to anticipate that it could cause any mischief, but in the course of the trial they alleged as a new and alternative ground of negligence or breach of absolute duty against the appellants that the appellants either knew or ought to have known what work the City was doing and failed to take, as they could and should have done, all proper precautions to prevent the escape of the dangerous gas which they were carrying in their mains. No amendment has ever been made of the pleadings, nor have any precise particulars been given of this head of claim. Their Lordships must observe that it is pessimi exempli to admit a new head of claim without a proper amendment of the pleadings. But this ground of claim has been considered by the trial judge and by the Appellate Division and must now be regarded as a relevant issue in the case. The trial judge decided against the contentions of the respondents, but the Appellate Division allowed the appeal solely on the new ground of claim.

Before discussing the facts in the case, it is desirable to explain the principles of law which, in their Lordships' judgment, are applicable.

That gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question. Thus the appellants who are carrying in their mains the inflammable and explosive gas are prima facie within the principle of *Rylands* v. *Fletcher* (1), affirming *Fletcher* v. *Rylands* (2): that is to say, that though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come prima facie within the rule of strict liability if the gas escapes: the gas constitutes an extraordinary danger created by the appellants for their own purposes, and the rule established by *Rylands* v. *Fletcher* (1) requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land: it applies equally in a case like the present where the appellants were carrying the gas in mains laid in the property of the City (that is in the sub-soil) in exercise of a franchise to do so: *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (3)

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(1) L. R. 3 H. L. 330.

(2) (1866) L. R. 1 Ex. 265.

(3) [1914] 3 K. B. 772.

This form of liability is in many ways analogous to a liability for nuisance, though nuisance is not only different in its historical origin but in its legal character and many of its incidents and applications. But the two causes of action often overlap, and in respect of each of these causes of action the rule of strict liability has been modified by admitting as a defence that what was being done was properly done in pursuance of statutory powers, and the mischief that has happened has not been brought about by any negligence on the part of the undertakers. As an illustration of this well known doctrine, reference may be made to *Green* v. *Chelsea Waterworks Co.* (1), where Lindley L.J. (1) said of *Rylands* v. *Fletcher* (2): "That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision." By the same reasoning the rule has been held inapplicable where the casualty is due to the act of God; or to the independent or conscious volition of a third party, as in *Box* v. *Jubb* (3), which was approved by the Judicial Committee in *Rickards* v. *Lothian* (4); and not to any negligence of the defendants. In *Box* v. *Jubb* (3) the act which caused the escape of the water from the reservoir was a malicious (which their Lordships think means no more than conscious or deliberate) act of a third person. It was said by Kelly C.B. (5): "I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose."

Lord Moulton in *Rickards'* case states the matter in these words (6): "A defendant cannot in their Lordships' opinion be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant."

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(1) 70 L. T. 547, 549.
(2) L. R. 3 H. L. 330.
(3) 4 Ex. D. 76.
(4) [1913] A. C. 263.
(5) 4 Ex. D. 79.
(6) [1913] A. C. 278.

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And in *Dominion Natural Gas Co.* v. *Collins and Perkins* (1), in a case for this purpose not dissimilar the question was put (1): "Have the defendants been able to show affirmatively that the true cause of the accident was the conscious act of another volition, i.e., the tampering with the machines by the railway company's workmen?" It is not here intended to enumerate all the defences which might be available to a defendant in this class of action: but the two defences mentioned are both material in this case. Reference was made to a further possible defence based on the contention that the appellants and the owners of the properties destroyed had a common interest in maintaining the potentially dangerous installation, or that these owners had consented to the danger. It is true that in proper cases such may be good defences, but they do not seem to have any application to a case like the present, where the appellants are a commercial undertaking, though no doubt they are acting under statutory powers, while those whose property has been destroyed are merely individual consumers who avail themselves of the supply of gas which is offered. These facts do not constitute a common interest or consent in any relevant sense.

Where undertakers are acting under statutory powers it is a question of construction, depending on the language of the statute, whether they are only liable for negligence or whether they remain subject to the strict and unqualified rule of *Rylands* v. *Fletcher.* (2) Thus in *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (3) it was held (following the previous decision in *Midwood & Co., Ld.* v. *Manchester Corporation* (4) that the defence of statutory authority was limited by a clause in the statutory Order providing that nothing therein should exonerate the Corporation from liability for nuisance. In *Hammond* v. *St. Pancras Vestry* (5), where the Act imposed on the Vestry the duty of properly cleansing their sewers, it was held that as these

(1) [1909] A. C. 640, 647.
(2) L. R. 3 H. L. 330.
(3) [1914] 3 K. B. 772.
(4) [1905] 2 K. B. 597.
(5) L. R. 9 C. P. 316.

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words were susceptible of meaning either that an absolute duty was imposed or that the duty was only to exercise due and reasonable care, the latter meaning was to be preferred, since the absolute duty could not be held to be imposed save by clear words. That case was followed in *Stretton's Derby Brewery Co.* v. *Mayor of Derby.* (1)

It accordingly now becomes necessary to consider the meaning of ss. 11 and 13 of the Alberta Water, Gas, Electric and Telephone Companies Act, cited above. Sect. 13 of the Act (which was then numbered s. 11) was considered by the Supreme Court of Canada in *Raffan* v. *Canadian Western Natural Gas Light, Heat and Power Co.* (2), affirming a decision of the Appellate Division in Alberta (3), where it was held that the section imposed an absolute duty on the company not only during the location and construction of the works but also during their operation. Their Lordships cannot agree with that decision in so far as it is sought to read into s. 13 some such word as "maintain" in addition to the words actually expressed, which are "locate and construct." Nor does it seem legitimate to read "locate and construct" as including something entirely different, that is "maintain": "locate and construct" are words apt only to refer to the initial location or construction or to some new works: once the works are located and constructed, the process of maintaining or keeping and repairing seems to involve a new and different idea and to involve different considerations. Their Lordships accordingly think that so far as s. 13 goes, the appellants are in regard to maintenance not within the section, and are entitled to the benefit of the statutory authority, and are subject only to the obligation to use reasonable care in the same way as in *Manchester Corporation* v. *Farnworth.* (4) It is accordingly not necessary for their Lordships to decide whether s. 13 imposes in matters to which it applies an absolute duty. But in any case, the question is not eventually material in this case. For, even if the section applies to maintenance, and is absolute in its terms, the duty it imposes is still no more than the duty under the rule in *Rylands* v. *Fletcher* (1) according to which the appellants would not be liable for damage caused, without default on their part, by the independent act of a third party. Then, whether or not s. 13 applies to maintenance, and whether or not it imposes, where it does apply, a liability unqualified in terms, the position is the same for purposes of this case: the appellants' real defence was that the damage was caused by the act of the City, for which they were not responsible and could not control, and that they were guilty of no negligence in the matter. That defence could be equally good on any view of the effect of s. 13: and the same reasoning applies to s. 11, if indeed that section is open at all to the respondents in this case.

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(1) [1894] 1 Ch. 431.
(2) (1914) 8 W. W. R. 676.
(3) (1914) 7 A. L. R. 459.
(4) [1930] A. C. 171.

It accordingly becomes necessary to consider the issues of fact which have occupied the greater part of the hearing of this appeal, as they seem to have done in the Courts below. The respondents have contended that the original construction of the pipe line was improper, and that the damage was solely caused thereby: the appellants have contended that not only was their original construction proper, but the breaking of the pipe was solely due to the ground beneath it being let down by the new sewerage works constructed by the City in 1931. The further issue which was raised if that were established—namely, whether the appellants were still in default because they ought to have foreseen and provided against the risk of damage through the City's underground work will be dealt with later.

Mr. Greene for the appellants, and Mr. Tilley for the respondents, have most exhaustively and ably laid before their Lordships the arguments on the one side and the other as to what caused the breaking of the 12-inch pipe from which the gas escaped. In the result their Lordships are in agreement with the finding of the trial judge that "the cause of the break in the welded joint through which the gas leaked were the operations of the City of Edmonton in constructing the 12-inch (it should be 15-inch) tile overflow sewer between manhole A and manhole B and the weir chamber at manhole A in the year 1931." It is only necessary here very briefly to summarize why their Lordships so decide.

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(1) L. R. 3 H. L. 330.

On the side of 107th Street in close proximity were three mains, all about three feet below the pavement: they were the 12-inch pipe and the 10-inch pipe belonging to the appellants, and a wooden conduit which the City had laid for their electric cables serving the street railway. Close to that position was manhole A, the bottom of which was about 16 feet below the surface: through manhole A and under the three mains went a 12-inch sewer, constructed in 1907, and similarly there ran into manhole A a 6-inch tile sewer constructed in 1913 and leading to a catch basin. In February and March, 1931, the City built manhole B in a position about 20 feet north of manhole A. It was excavated from the ground, and an open trench was made to the north from manhole B in which a sewer was laid. But also from manhole B, a new 15-inch overflow sewer was laid to manhole A, into which it was opened by way of a weir chamber, which was built for that purpose by opening up the side of manhole A. All this work was underground: the tunnel for the new overflow sewer was dug from manhole B, but the new weir chamber, which was built of brick, with a concrete filling on top, was constructed from manhole A. In building the weir chamber, earth was excavated, apart from the excavation to make the tunnel, to a width of about 52 inches, a height of about 5 feet 6 inches and a depth of about 3 feet. This excavation for the weir chamber was almost directly beneath the three mains. The work was finished early in April, 1931: it was in February, 1932, that the 12-inch pipe broke and leaked. When the place was opened up it was found that the pipe had sagged at the spot above the weir chamber about 6½ inches; the 10-inch pipe and the wooden conduit had also sagged very considerably. These coincidences of time and place would point very strongly to the conclusion that the excavation was the cause, the ground beneath having in consequence been disturbed and having then subsided. This inference is strengthened by the observations made when the ground by the weir chamber was opened up after the accident. Examinations were made

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on two successive days, July 7 and 8, 1932: experts on both sides were present. There was much conflict of evidence, but the trial judge, on a pure question of fact as to what was seen, must have accepted the evidence given on behalf of the appellants, which was that when a hole was broken in the wall of manhole A above the weir chamber, a cavity in the earth, extending 12 inches long by 12 inches wide and 2 inches deep, was found above the roof of the chamber, which the appellants' experts stated indicated a failure to give proper support and involved some disturbance of the adjacent soil. On the other hand, the evidence given on behalf of the respondents to show that there was original imperfect construction of the appellants' 12-inch main seems quite unsatisfactory. The 12-inch pipe was about 77 feet long and was made into a single length by means of three welded joints, the centre one of which gave way. It was said that the welding was not properly done, but that allegation failed: it was said that the pipe was not properly laid because it must have been laid on loose earth composed of backfilling material: when it was opened up it was 6½ inches out of line, and the settlement was ascribed to backfilling being squeezed out by the effects of freezing in the winter, the pipe having in fact been laid within the frost area. But that was all inference based on the view that the bottom of the tunnel had not been properly levelled off, and it was assumed that the whole 77 feet had been tunnelled. In fact, the part in which the centre welded joint was laid was in an open excavation: only two portions of the width of the street of about 12 feet each had been tunnelled, between the three portions of about 15 feet each which had been excavated from the street level. The settlement of the 12-inch main and of the two adjacent pipes was much more consistent with a general subsidence of the ground than with any defect in the manner the pipe was laid: there was no substantial evidence to justify the conclusion that the laying was defective.

Their Lordships accordingly agree with the finding of the trial judge on this point, which is not expressly dissented from, though not affirmatively accepted, by the majority in the Appellate Division, who did not feel it necessary to give any opinion.

There remains the further point, which is, that assuming that the City in fact let down the ground and caused the pipe to break, still the appellants should have foreseen and guarded against the risk of their pipes being affected. This alternative plea of negligence was, as has been said, not pleaded, but it was dealt with by the trial judge and by the Appellate Division without the pleadings being amended and without any demand by the appellants for leave to adduce further evidence. As it has been dealt with in the Court below, their Lordships do not feel able to exclude it. But it certainly calls for most critical consideration, and the respondents are not relieved, by failing to plead properly, from proving their case properly.

The authorities already cited herein show that, though the act of a third party may be relied on by way of defence in cases of this type, the defendant may still be held liable in negligence if he failed in foreseeing and guarding against the consequences to his works of that third party's act. The trial judge on this issue found that " in the absence of notice, the defendant ought to have known even if it did not, that the operations were going on because of the length of time they were carried on, and the conspicuous and public nature thereof." The trial judge, however, went on to hold " that the defendant had the right to rely upon the City Engineer, with whose department it had been in close contact when it constructed its distribution system in 1923, seeing that the work was done in such a way that such a result as has happened would not occur." Harvey C.J.A. came to a different conclusion, and on that ground allowed the appeal and gave judgment against the appellants. He said: (1) " What we are concerned with here is not the City's obligation to the defendant, but the defendant's obligation to the public who may be affected by its operations. I cannot think that the defendant performed its full duty to them when it failed to inspect city operations which might affect the security of its pipes and to take such steps as might be necessary to protect them. It would have meant extra trouble and expense no doubt but there would have been no difficulty in ascertaining

(1) (1935) 1 D. L. R. 140; (1934) 3 W. W. R. 647.

from the city where such operations were taking place and seeing that all proper safeguards were taken as provided."

The question here is between the respondents and the appellants. It may be that the respondents, treating them all as property owners, have or had a claim against the City on the facts as found by their Lordships: such a claim would prima facie be within the principle of such a case as *Hardaker* v. *Idle District Council* (1), where a district council in making, by their contractors, a sewer, negligently broke a gas main the gas from which escaped into the plaintiff's house and caused damage: it was held that the defendants were liable in tort to the plaintiff. This is not a matter on which their Lordships can properly express an opinion since it is a question between parties who are not before them. It may also be that the City are liable to the appellants if they have let down the ground in which the appellants' pipes were laid; prima facie they are not entitled to derogate from the franchise they have granted, and in addition they may be liable under the provision quoted above contained in the agreement granting the franchise. Their Lordships here again have no desire to pass on matters not before them. The question in these proceedings is between the respondents, as or representing property owners, and the appellants as undertakers, who are carrying an element, gas, in their mains close to the owners' premises; the gas is carried at high pressure, is very dangerous if it escapes and calculated if it does escape to damage, as it did, the owners' property. The appellants accordingly owe a duty to the respondents, even though the case falls outside the rule of strict or absolute liability, to exercise all care and skill that these owners should not be damaged. The degree of care which that duty involves must be proportioned to the degree of risk involved if the duty should not be fulfilled. It has been found both by the trial judge and by the Appellate Division that the appellants were put on enquiry, at least, as to the operations which the City were conducting in the vicinity of their mains, in particular of the 12-inch intermediate pressure main, where the pressure of the gas was 40 lbs. to the inch. Even if the operations at manhole B were, so far as above ground, in a direction opposite to manhole A, and even though the tunnel from manhole B to manhole A was underground, still manhole B was only 20 feet from manhole A: but of particular moment was the fact that the building of the weir chamber, which involved men working on it and carrying down bricks and cement, cannot but have been obvious to the appellants' employees if they were taking any interest in what the City did in the vicinity of the appellants' mains. In ordinary course, the City might at any time be conducting operations in connection with their sewers in the vicinity of the appellants' mains, and it was the appellants' duty to watch such operations. This particular operation was, as both Courts have held, from its public nature and conspicuous character, and from the time during which it went on, such that a failure by the appellants to know of it is plainly not consistent with due care on their part in the interests of members of the public likely to be affected. The appellants have strenuously contended that they are embarrassed because they have had no particulars of what is complained of, and no opportunity of calling evidence in answer. But if that were a grievance, it might have been, but was not, availed of in the Courts below.

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(1) [1896] 1 Q. B. 335.

In truth, the gravamen of the charge against the appellants in this matter is that though they had the tremendous responsibility of carrying this highly inflammable gas under the streets of a city, they did nothing at all in all the facts of this case. If they did not know of the City works, their system of inspection must have been very deficient. If they did know they should have been on their guard: they might have ascertained what work was being done and carefully investigated the position, or they might have examined the pipes likely to be affected so as to satisfy themselves that the bed on which they lay was not being disturbed. Their duty to the respondents was at the lowest to be on the watch and to be vigilant: they do not even pretend to have done as much as that. In fact, so far as appears, they gave no thought to the matter. They left it all to chance. It is, in their

Lordships' judgment, impossible now for them to protest that they could have done nothing effective to prevent the accident: and in any case their Lordships cannot accept that as the true view.

In the result their Lordships agree with the decision on this point of the Appellate Division, and are of opinion that the appeal should be dismissed. The respondents, however, have failed on the issue which has bulked so largely, whether the breaking of the pipe was due to the fault of the City or of the appellants, and succeed on an issue not raised in the pleadings, and the costs to be paid by the appellants ought to be reduced accordingly.

The order of the Appellate Division ought therefore to be varied by reducing by one-third the amount of costs payable under that order by the appellants to the respondents, and the appellants ought to pay to the respondents two-thirds only of their costs of this appeal.

Their Lordships will humbly so advise His Majesty.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondents: *Blake & Redden.*

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GREAT WESTERN RAILWAY COMPANY APPELLANTS;

AND

WEST MIDLAND TRAFFIC AREA LICENSING AUTHORITY . . . . RESPONDENT.

Motor-car—Goods vehicle—Application for B. Licence—Notice of Application—Area of User—Limitation—Road and Rail Traffic Act, 1933 (23 & 24 *Geo.* 5, *c.* 53), *ss.* 2, 5, 11.

Practice—Order of Licensing Authority quashed by Writ of Certiorari—Writs of Supersedeas and Procedendo.

An applicant for a limited carriers' licence (a B. licence) under the Road and Rail Traffic Act, 1933, in respect of a motor vehicle in describing the area which he intends to serve is only bound to state the district within which or the places between which

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* *Present:* Lord Blanesburgh, Lord Atkin, Lord Russell of Killowen, Lord Macmillan, and Lord Maugham.

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he intends normally to use the vehicle. In granting such a licence the licensing authority may, if he thinks fit, under s. 8, sub-s. 3 (*a*), of the Act attach to the licence a condition that it shall be used only in a specified district or between specified places; or he may grant the licence without imposing any restriction.

When a rule nisi for a writ of certiorari has been made absolute by the King's Bench Division and an appeal to the Court of Appeal from the order absolute has been allowed, whether it is necessary to sue out writs of supersedeas and procedendo to avoid the writ, *quaere*.

Order of the Court of Appeal [1935] 1. K. B. 449 affirmed.

Appeal from an order of the Court of Appeal (1) made in the matter of *Rex* v. *Western Midland Traffic Licensing Authority; Ex parte Great Western Ry. Co.*

The facts shortly stated were as follows: A firm of Hill & Long, Ld., of High Street, West Bromwich, applied under the provisions of the Road and Rail Traffic Act, 1933 (2), for a limited carriers' licence, called in the Act a B. licence, in respect of two motor vehicles. They described the nature of their business as "Furniture removing and delivery of furniture"; the class of goods they proposed to carry as

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(1) [1935] 1 K. B. 449.

(2) The Road and Rail Traffic Act, 1933, s. 2, sub-s. 1: "Licences shall be of the following classes:— (*a*) public carriers' licences; (*b*) limited carriers' licences." . . . .

By sub-s. 3: "A limited carriers' licence (in this Part of this Act referred to as 'a B. licence') shall entitle the holder thereof to use the authorized vehicles, as he thinks fit from time to time, either for the carriage of goods for or in connection with any trade or business carried on by him, or, subject to any conditions which the licensing authority, in the exercise of his discretion to attach conditions to a B. licence, may attach to the licence, for the carriage of goods for hire or reward."

By s. 5, sub-s. 1: "A person applying for a licence shall submit to the licensing authority a statement in the prescribed form— . . . . (*c*) specifying, in the case of an A. licence or a B. licence, the facilities for the transport of goods intended to be provided by him under the licence for other persons, including particulars of the district within which, or the places between which, it is intended that the authorized vehicles will normally be used for the purpose of carrying goods for hire or reward."

By s. 11, sub-s. 1: "The licensing authority shall publish in the prescribed manner notice of an application to which this section applies specifying the time within which, and the manner in which, objections may be made to the grant of the application."

By sub-s. 3, the section applies to every application for the grant of an A. licence or of a B licence.

"Furniture," and the districts or places between which the vehicles would normally be used as "Birmingham, Wolverhampton, Sutton, Hagley."

The Licensing Authority published in the prescribed form a notice of this application in these words: "West Bromwich 3062. Hill and Long, Limited, 312/314 High Street, Furnishers and Furniture Removers"—then followed figures and letters indicating two vans in use, in respect of which the grant of a licence was discretionary; the notice proceeded—"Furniture. Wolverhampton. Birmingham and District." The Great Western Railway Co. lodged no objection to the grant of a B. licence as described in the notice of application, and in due course on September 17, 1934, the Licensing Authority notified his decision to grant a B. licence to Messrs. Hill and Long, Limited, for "2 Vans, 3¼ tons. Furniture and Household effects any distance."

The Great Western Railway Co. obtained rules nisi for writs of certiorari, mandamus and prohibition for the purpose of removing into the King's Bench Division and quashing, or otherwise obtaining relief from, the decision of the Licensing Authority upon the grounds that the Authority had no power to add the words "any distance" to the grant of the licence, but could only refuse or grant the application as published; or grant a licence for a lesser number of vehicles, or a more restricted class of goods, or a more restricted district of operation.

On cause being shown a Divisional Court (Lord Hewart C.J. and Avory and Swift JJ.) made the rules absolute and quashed the order of the Licensing Authority.

The Licensing Authority appealed. The Court of Appeal (Greer, Slesser and Roche L.JJ.) allowed the appeal. (1)

The Great Western Railway Co. appealed to this House.

Oct. 29. *Monckton K.C.*, *Morrison K.C.*, and *B. de H. Pereira* for the appellants. By the terms of s. 2, sub-s. 1, of the Road and Rail Traffic Act, 1934, a B. licence is "a limited carriers' licence." The respondent has in effect presented

(1) [1935] 1 K. B. 449.

the firm of Hill & Long, Ld., with an unlimited carriers' licence. By s. 5, sub-s. 1, of the Act, when applying for an A. licence or a B. licence the applicant must submit to the Licensing Authority a statement specifying, among other things, particulars of the district within which, or the places between which it is intended that the authorized vehicles will normally be used; and by s. 11, sub-s. 1, the Licensing Authority must publish notice of this application. The purpose of these provisions is to give notice to persons, who are already supplying transport services in the places and over the district named in an application, an opportunity of coming forward and contending that the places and districts are already sufficiently served, and that the application if granted will lead to wasteful competition and unnecessary congestion of the highways, or other inconvenience. The appellants, seeing the notice of the application, were lulled into acquiescence believing that the area of operation of the licence comprised only a district in the Midlands which would not seriously affect the area served by their railway. Now they find that the applicants have been licensed to carry "any distance" from that district.

[Lord Blanesburgh. You must be taken to know the terms of the Act. An applicant is only bound to state "particulars of the district within which, or the places between which, it is intended that the authorized vehicles will normally be used." You knew that the applicants were carriers of furniture.]

The addition of the words "any distance" makes it impossible to infer the extent of the claim which is being made. If those words are allowed to stand they convert this so-called B. licence into an A. licence. It was the duty of the respondent to attach a condition under s. 8 of the Act that the vehicles shall only be used within certain limits.

Sir Thomas Inskip A.-G. and *Valentine Holmes* for the respondent were not called on.

At the conclusion of the argument for the appellants, the House gave judgment as follows:—

Lord Blanesburgh. My Lords, this appeal, in my judgment, fails, and availing myself of the detailed statement of the facts and the careful analysis of the Road and Rail Traffic Act, 1933, to be found in the judgments under review, I can justify that conclusion, as I hope, quite simply.

My Lords, an A. licence and a B. licence under this Act have much in common. It is, however, important to note some of the distinctions between them, for these distinctions throw a light, as I think, upon the question of construction raised by this appeal.

A public carriers', or A. licence, is a licence granted to an applicant whose business is that of a carrier of goods (s. 2, sub-s. 2). A limited carriers', or B. licence, is one granted to an applicant whose trade or business is other than that of a carrier of goods (s. 2, sub-s. 3).

Consistently with this distinction, an A. licence when granted is always unrestricted in area; so also is a B. licence so far as it entitles its holder to use the authorized vehicles for the carriage of goods for or in connection with any trade or business carried on by himself. It is only in so far as the B. licence is an authority to him by these vehicles to carry goods for hire or reward that there may, amongst other conditions, be attached to the licence the condition (s. 8, sub-s. 3 (*a*)) that the vehicles shall be so employed only in a specified district or between specified places. It is not, I think, in the contemplation of the Act, either in the case of an A. licence or a B. licence, that there shall ever be any limitation of area except in the case of a B. licence in the circumstances just stated. The reference to the " district specified in the licence " in s. 11, sub-s. 3, requires perhaps some explanation. The words, I take it, are in reference to a B. licence so limited.

These considerations are, I think, of assistance in arriving at the true meaning and effect of s. 5, sub-s. 1 (*c*), upon which so much turns. A person applying for a licence is by that sub-section required to submit to the Licensing Authority a statement in the prescribed form " specifying in the case of an application for an A. licence or a B. licence the facilities for the transport of goods intended to be provided by him under the licence for other persons, including particulars of the district within which or the places between which it is intended that the authorized vehicles will normally be used for the purpose of carrying goods for hire or reward."

My Lords, as has been shown, there is in the case of an A. licence no power under the Act to restrict its operation to any district or between particular places; nor is there any such power in the case of a B. licence, except in the way authorized by s. 8, sub-s. 3 (*a*). This makes clear what, in itself, is perhaps clear enough—namely, that "normally" is the emphatic word in this sub-section, and from its use alone I would draw the conclusion that while only exceptional user outside what I may call the area of normal user is expected, it is the assumption of the sub-section—in correspondence with the other provisions of the Act to which I have referred—that the B. licence when granted as a rule, no less than the A. licence always, will be unrestricted as to the area over which it extends. It appears to me, therefore, that when, in this case, Messrs. Hill & Long, Ld., on May 7, 1934, using the prescribed form, applied for a B. licence specifying "Birmingham, Wolverhampton, Sutton, Hagley," as being, in the words of the application, the "Districts in which, or places between which, the vehicles will normally be used," they were implicitly making an application for a B. licence unrestricted in area: a licence which, in response, it was within the power of the Licensing Authority to grant if, all statutory conditions being complied with, he thought fit so to do.

But, my Lords, further light and in the same direction is, I think, thrown on s. 5, sub-s. 1 (*c*), of the Act by s. 11, which is complementary to it. That section required the Licensing Authority to publish in the prescribed manner, as he did, notice of Messrs. Hill & Long's application, specifying the time within which and the manner in which objections might be made to the grant of the licence applied for. Thereupon by sub-s. 2 it became his duty "to take into consideration any objections to the application which may be made by persons who are already providing facilities, whether by means of road transport or any other kind of transport, for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve, on the ground that suitable transport facilities in that district, or between those places, are or, if the application were granted, would be, either generally or in respect of any particular type of vehicles, in excess of requirements, or on the ground that any of the conditions of a licence held by the applicant has not been complied with."

My Lords, the authorized objectors, it will be noted, must be persons providing facilities "for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve." These words, in my judgment—and I express only my own individual view—are too close to those in s. 5, sub-s. 1 (*c*), to make it possible to refer them to any other than what I have ventured to call the area of normal user specified by the applicant, as the statute requires, in his application. And further, not only can it fairly be said, as I think, speaking again for myself, that that is the only area which the applicant "intends to serve," but the words, if applied to the whole country, become, in my view, meaningless.

My Lords, a very important consequence results from this view. It is "the area of normal user" to which alone, whether in the case of an A. licence or a B. licence, the attention of the Act is directed. It is only from competitors in that area that objection is heard; it is to the traffic conditions of that area that the attention of the Licensing Authority is directed. No provision is made for objection from any other quarter, for the reason, I cannot myself doubt, although it is not so expressed, that, to adopt the language of s. 11, sub-s. 4 (*a*), of this Act, and so far as the outside area is concerned, "having regard to the trivial nature of the application, it is not necessary that any opportunity should be given for objection." The licence only continues for a year, and if on an application for a further licence it appears that the area of normal user has been in use extended, that would be an opportunity either for refusing the licence for a second year or in any case for limiting its operation to a prescribed area. The appellants in this case were authorized objectors. They did not appear to object to the grant of the B. licence. Had they done so, they would, interested as they are also in the outside area, have been entitled to ask that the licence should be limited to the area of normal user. The Licensing Authority, in the absence of any such request, decided that the licence for the applicants' two authorized vehicles should be for " Furniture and household effects any distance."

My Lords, for the reasons I have given I can see no excess of jurisdiction in that decision, and I move your Lordships that this appeal be dismissed with costs.

Lord Atkin. My Lords, this is an appeal on an application for a writ of certiorari that a decision of the Licensing Authority for the West Midland Traffic Area should be brought up to be quashed on the ground of lack of jurisdiction to make it. The grounds which are set out in the rule nisi and upon which the matter must be decided are, firstly, that " The said Licensing Authority had no power to make the said decision upon the said application as published," and, secondly, that " The said Licensing Authority had only power to refuse or to grant the said application as published or to grant a licence for a lesser number of vehicles and/or a more restricted class of goods and/or a more limited district of operation." Personally, I am unable to see any difference in principle between the second ground and the first, but the first is undoubtedly the important matter.

The matter arises under the Road and Rail Traffic Act, 1933, which provides for applications for licences to use vehicles for the purpose of carrying goods. There are three forms of application for licences, A., B. and C. We need not trouble with C. An A. licence is a licence which is granted to a public carrier of goods for hire or reward, that is to say, of the goods of other persons, not goods in his own business, and that licence, it is admitted, if granted, is granted free of any restriction as to area. A B. licence is a licence which carries the right to use vehicles for the carriage of goods in the applicant's own trade or business and also for the carriage of other people's goods for hire or reward, and that licence also, unless the Licensing Authority chooses to impose restrictions as to area, is a licence which is unrestricted in area. The application has to be made in a prescribed form, and the contents of the application are prescribed by the statute. By s. 5, sub-s. 1, of the Act it is provided that " A person applying for a licence shall submit to the licensing authority a statement in the prescribed form—(*a*) containing . . . . such particulars as may be prescribed," and so on; " (*b*) stating the number and type of hired motor vehicles " and so on; and " (*c*) specifying, in the case of an application for an A. licence or a B. licence, the facilities for the transport of goods intended to be provided by him under the licence for other persons, including particulars of the district within which, or the places between which, it is intended that the authorized vehicles will normally be used for the purpose of carrying goods for hire or reward."

The prescribed form is the same form of application for both A. and B. licences, and in respect of both of them it requires the applicant, under heading No. 5, to state " Facilities which applicant proposes to provide: (*a*) Class or description of goods to be carried; (*b*) Districts in which or places between which the vehicles will normally be used." That appears to me to conform precisely to the terms of the statute; but it is to be noted that it is that form, and that form only, which the applicant is bound to use. Accordingly the applicants in the present case, Messrs. Hill & Long, Ld., of West Bromwich, stated the nature of their business as being " Furniture removing and delivery of furniture," and in reply to No. 5 they stated: " (*a*) Class or description of goods to be carried: Furniture. (*b*) Districts in which or places between which the vehicles will normally be used: Birmingham, Wolverhampton, Sutton, Hagley."

Now that application came before the Licensing Authority. It was his duty in the words of s. 11, sub-s. 1, of the Act to

" publish in the prescribed manner notice of an application to which this section applies specifying the time within which, and the manner in which, objections may be made to the grant of the application " ; and there is a form of notice prescribed by the Rules. Rule 9 provides : " The Licensing Authority shall cause to be issued as occasion may require a statement hereinafter called ' Applications and Decisions ' which shall contain (unless previously notified therein) :—(I.) As regards notifiable applications " (and this was a notifiable application) . . . . " (*a*) notices of such applications ; (*b*) The dates . . . . on which and the places at which he proposes to hold Public Inquiries and the applications which he proposes to consider at those Inquiries." He is not obliged to hold a Public Inquiry except in special circumstances when he decides to do so.

In accordance with that Rule prescribing the form of notice, the Licensing Authority published, in what appears to me and I think to all your Lordships to be strict accordance with the Rule, the notice which is contained in Document No. 4 of the Exhibits in this case : " West Bromwich. Hill & Long, Ltd., 312 and 314, High Street. Furnishers and Furniture Removers. Dis. 2V (3¼ T) "—which means two discretionary vehicles of a total unladen weight of 3¼ tons—" in use." The goods to be carried are described as " Furniture," and then there follows : " Wolverhampton, Birmingham and District," being plainly a reproduction of the statement in the application of the district in which it is intended normally to use the vehicles. The applications are in like form, and indeed it may be noted that in the notice which is given of the application for an A. licence precisely the same form is used ; the applicants for an A. licence state the district in which they intend normally to use the vehicles—a limited district—and that is published.

The application was considered by the Licensing Authority, and the Licensing Authority thought fit not to impose any condition or restriction as to area. It was entirely within his discretion whether he should do so or not. The forms were in accordance with the statutory forms, he was acting within his statutory power, and I confess that I fail to see how any suggestion can arise that there was any lack of jurisdiction, for he was acting in every way in accordance with the procedure prescribed by the statute and was exercising the jurisdiction which was given to him by the statute.

The point which was suggested to the Divisional Court was, I think, twofold: First of all it was suggested, though probably not with much effect, that when a person applied for a licence and stated the district within which he was intending normally to use the vehicle, that in itself was a statement of the district to which he intended to confine the use of his vehicle. That suggestion appears to me to be contrary to the actual words of the application and of the statute. Then it was suggested that in any event when the Licensing Authority published notice of the application, and in the notice stated the area as being a particular district—in this case, as I have read to your Lordships, "Wolverhampton, Birmingham and District"—he was stating for some reason or other that that was the only district within which the applicant proposed to use his vehicle. That, again, as I have said, appears to me to be contrary to the terms of the statute and to the form of the application. I see no obligation on the part of the Licensing Authority to publish anything other than that which he is ordered by the statute and by the Rules to publish, and with that, as I have said, he has complied by publishing the district as the district of normal user.

My Lords, that appears to me to dispose of the whole case as to lack of jurisdiction. It is said that the Court is driven to a different conclusion, and must take either the application or the notice (and I have found it very difficult to distinguish between the two), though in terms referring to the district as the district of normal use, as describing the district of sole use; and it is said that that must be so because of the difficulty which there otherwise would be in objecting. I have myself no doubt that the learned judges in the Divisional Court came to the conclusion that the application itself was

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limited to the particular district. I find that the learned Lord Chief Justice in his judgment says: "It appears to me that we should be reducing the Act . . . . to a mere nullity if we were to hold, as is suggested, that there might be an application in terms confined to a very limited area . . . . and that afterwards . . . . that area . . . . should be so enlarged," and so on; and Avory J. in the course of his judgment, in dealing with the powers of objection, says: "it is obvious that a person who is already providing facilities in a certain area cannot fill up that form in an effective manner unless the application which is made is limited to a certain district or for the use of the vehicles in one certain place." I have already stated that the terms of the statute and of the application and of the Rules appear to me to afford no ground for putting that limited meaning upon the application.

A question no doubt may arise on the terms of s. 11, sub-s. 2, which provides: "It shall be the duty of the licensing authority, on an application to which this section applies, to take into consideration any objections to the application which may be made by persons who are already providing facilities, whether by means of road transport or any other kind of transport, for the carriage of goods for hire or reward in the district, or between the places, which the applicant intends to serve, on the ground that suitable transport facilities in that district, or between those places, are or, if the application were granted, would be . . . . in excess of requirements." My Lords, I desire to express no opinion on the question, which has been suggested as possibly likely to arise on other occasions, as to whether those words "in the district, or between the places, which the applicant intends to serve" mean the district or places which he intends normally to serve, or the district or places which he has the power to serve under his application. I can quite see the force of the construction which adapts those words to the words in s. 5 and the form of the application and so forth. On the other hand, I can well understand, as Mr. Morrison has pointed out, that if they do not apply to abnormal user, the accumulation of abnormal user by a number of B. licensees may amount to a very serious dislocation of and interference with existing traffic and may lead to a possible excess of facilities if they are all granted. For my part, I should like not to pass an opinion upon the question whether or not an objector is entitled to object to what may be called an abnormal user by a single B. licensee of his vehicle. I do not think that in this case the matter arises.

The only other point which I wish to mention is this. I was a little startled to find that when the Court of Appeal had in fact discharged the rule and stated their disagreement with the Divisional Court and had reversed the decision of the Divisional Court, it was considered necessary to proceed by a writ of procedendo and also by a writ of supersedeas in order to get the matter put right. I am bound to say that the view which I had formed of the effect of a judgment of the Court of Appeal reversing a decision below was that the decision below became as though it had never been pronounced, which I think is the general effect so far as writs of execution and other things are concerned. The matter has been in fact settled, because I think the necessary writs have been granted and the order quashing the decision has now been put an end to, but I wish merely to reserve my own opinion as to whether or not it was really necessary to proceed by way of those writs.

My Lords, I am entirely in accord with the motion which has been proposed by the noble and learned Lord on the Woolsack.

LORD RUSSELL OF KILLOWEN. My Lords, I also am in agreement with the motion, and I can state my reasons shortly.

The appellants' claim to relief here is founded upon an alleged want of jurisdiction in the Authority in coming to his decision, and that allegation has been supported in your Lordships' House upon two grounds, the first of which does not appear in the order which granted the rule nisi. It was here stated thus: it was said that the application was an irregular application, not in accordance with s. 5 of the Act, the alleged irregularity being an omission by the applicant to state in his application the maximum limits of his area of user. It was then said that, the application being an irregular application, no decision could properly be given in respect of it.

My Lords, I cannot understand what foundation exists for this allegation of irregularity in the application. Sect. 5 of the Act, as I read it, imposes no obligation on the applicant to make such a statement at all. Sect. 5 requires the applicant to submit a statement in the prescribed form specifying the facilities for the transport of goods intended to be provided by him. That is the applicant's duty, and the form which had been prescribed included all the details which the section specifically requires to be included, including the area of normal user. It appears to me that the application was complete and regular in every respect.

The second ground alleged for the contention of want of jurisdiction was this. It was said that the Authority was not entitled to grant the application otherwise than as published. That was elaborated in greater detail in the order granting the rule nisi, in these terms: "The said Licensing Authority had only power to refuse or to grant the said application as published or to grant a licence for a lesser number of vehicles and/or a more restricted class of goods and/or a more limited district of operation," the references there being to the provisions of s. 6, sub-s. 1 (*a*), and the provisions of s. 8, sub-s. 3 (*a*) and (*b*), of the Act. That contention depends wholly upon the view that the publication in this particular case stated that this was an application for a licence to use vehicles within a limited area. In my opinion that meaning cannot be attributed to this publication. Read in the light of the Act, as we must read it, it is a statement that Hill & Long, Ld., have applied for a B. licence which (I am now using the words of s. 2, sub-s. 3, of the Act) shall entitle them to use two motor vehicles as they think fit from time to time for the carriage of furniture for hire or reward, and that (in the words of

s. 5, sub-s. 1 (*c*)) the authorized vehicles will normally be used in Wolverhampton, Birmingham and District. Upon that application the Licensing Authority had, in my opinion, full jurisdiction to decide to grant the B. licence without attaching any condition limiting the area of operation under s. 8, sub-s. 3 (*a*).

My Lords, for those reasons I concur in the motion proposed.

Lord Macmillan. My Lords, an applicant for a licence under the Act, whether an A. licence or a B. licence, is required to furnish particulars (inter alia) " of the district within which, or the places between which, it is intended that the authorized vehicles will normally be used for the purpose of carrying goods for hire or reward." This requirement to my mind is so phrased as to suggest that the applicant is to give a general description of the area of his proposed operations rather than a legally binding definition of it. Such information is obviously material to enable the Licensing Authority to judge of the expediency of granting the licence, and also to enable the applicant's competitors to decide whether they shall object. But the statute nowhere prescribes, nor do the statutory forms require, that either an A. licence or a B. licence when granted shall contain any definition of area. In the case of the B. licence, however, the Licensing Authority may in his discretion attach a condition that the authorized vehicles shall be used " only in a specified district or between specified places." This means that in the Licensing Authority's discretion he may equally refrain from attaching any such geographical limitation. Accordingly, when notice is given that a B. licence has been applied for, all potential objectors are thereby made aware that the licence may be granted without any condition limiting it to a specific area.

It is complained in the present case that the Licensing Authority had no jurisdiction to decide that he would grant the applicant a licence for " any distance," because no previous notification had been given that a licence unlimited as to area had been applied for. In my opinion, a notification that an application has been made for a B. licence is a notification that if the application is granted a licence of unlimited geographical extent may be accorded. The appellants have, therefore, no right to complain that what has been done has been done without due notice; and as this complaint is the basis of their case I agree with your Lordships that the appeal should be dismissed.

Lord Macmillan.

I may add that no licence has yet been issued; the Licensing Authority has only announced that he does not propose in this case to exercise his discretion to impose a geographical limitation. It does not follow that the words "any distance" will appear in the licence when issued. I presume they will not, for the form of B. licence, which we have seen, does not provide for any mention of area except where the Licensing Authority has exercised his discretion to impose a geographical limitation.

LORD MAUGHAM. My Lords, I am of the same opinion, and do not think it necessary to repeat what has already fallen from your Lordships, statements with which I entirely agree. I will add only two observations.

What has been called the area of normal user must be stated in an application, whether it be for an A. or for a B. licence. On the other hand, the actual licence will not in general have any reference to this area. In the case of an A. licence it cannot properly be so limited; in the case of a B. licence it will not be so limited unless under s. 8, sub-s. 3, the Licensing Authority in his discretion thinks fit to impose a condition to that effect. The licence, however, whether an A. licence or a B. licence, is one granted upon a representation of a distinct character made by the applicant, and inasmuch as an A. licence endures only for two years and a B. licence for one year, it is plain that there is a very strong sanction (if that popular word may be used) to induce the applicant to be very careful in making his representation as to the area in which he proposes normally to use his vehicles.

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The other observation which I wish to make is with reference to s. 11. I have nothing to say on the first subsection; I agree entirely with what has already fallen from your Lordships on that point. As to sub-s. 2, I incline to take the same view as that which my noble and learned friend Lord Blanesburgh has taken, but I wish plainly to observe that in my opinion it is immaterial for the decision of this appeal to determine whether the word "normally" ought to be implied in the phrase "in the district, or between the places, which the applicant intends to serve," or whether the words should be left without any implication of that character. If the word "normally" is to be implied, which is the argument strenuously pressed upon your Lordships, the only conclusion which I think can properly be drawn as to the true construction of the Act on this point is that the Legislature thought it unnecessary to entitle persons who would be affected only by an abnormal user in the district in which they have ordinarily carried on their business to object to such casual, and probably rare, user of vehicles as might perhaps compete with them. If, on the other hand, the word is not to be implied, then the whole of the argument based upon the construction of s. 11, sub-s. 2, falls to the ground.

My Lords, on the grounds already given by your Lordships I concur in the proposed motion.

Ordered and Adjudged, in the name of the House of Lords, by the Lords of Appeal sitting in the House of Lords during the Dissolution of Parliament, by virtue of a Writing by His Majesty the King under His Sign Manual, dated October 25, 1935, *pursuant to the provisions of the Appellate Jurisdiction Act,* 1876, *That the Order of the Court of Appeal, of February* 4, 1935, *complained of in the Appeal of the Great Western Railway Company, be Affirmed, and that the Appeal be dismissed; And further Ordered, That the*

Appellants do pay to the Respondent the Costs incurred by him in respect of the said Appeal.

Lords' Journals, Oct. 29, 1935.

Solicitor for appellants : *A. G. Hubbard.*
Solicitor for respondent : *The Treasury Solicitor.*

[PRIVY COUNCIL.]

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GILBERT (PLAINTIFF) . . . . APPELLANT;

AND

CHING (DEFENDANT) . . . . RESPONDENT.

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY (SUPERIOR NUMBER).

Jersey—Will—Disposition of Immovables—Proceedings to determine validity—Jurisdiction of Cour du Samedi to exclusion of Cour d'Héritage—Laws of Jersey, 1851, *art.* 28.

By art. 28 of the Law of Jersey, 1851 : " Les actions touchant la validité des Testamens contenant des legs d'immeubles seront instituées à la Cour du Samedi, et aussi les actions en partage des immeubles d'une succession, lorsque ces immeubles auront été légués en tout ou en partie par Testament."

Held, that art. 28 of the Law of 1851, which for the first time authorized, subject to conditions, the disposition of immovables in the Island of Jersey by will, conferred jurisdiction to entertain proceedings relating to the validity of such wills upon the Cour du Samedi (which sits weekly) to the exclusion of the Cour d'Héritage (which sits only twice a year).

The Cour d'Héritage, a very ancient Court, had no original jurisdiction to decide as to the validity of wills disposing of immovables in Jersey, because before the Law of 1851 such disposition by will was forbidden and unknown, and there is no ground for conferring any implied jurisdiction on the Cour d'Héritage.

Judgment of the Superior Number of the Royal Court of Jersey affirmed.

* *Present :* LORD ALNESS, LORD MAUGHAM, and LORD ROCHE.

APPEAL (No. 69 of 1934) from a judgment of the Heritage Division (Superior Number) of the Royal Court of the Island of Jersey (May 31, 1933) affirming a judgment of the Heritage Division (Inferior Number) of that Court (November 21, 1932).

The appellant, Charles William Gilbert, as procureur of George James Gilbert, brought the present action on October 6, 1932, a previous action having been begun in 1929, against the respondent, Francis Henry Ching, procureur of John James Ching, claiming from the respondent a share of the immovable property in Jersey owned by the testator, George Edward Ching, at the time of his death in Melbourne, Australia, in August, 1907. G. J. Gilbert, claiming as a co-heir to the immovables of the testator in Jersey, instituted the proceedings against J. J. Ching as principal heir, in the Inferior Number of the Cour d'Héritage, an ancient Court which sits twice a year.

The question for decision in this appeal was whether that Court had jurisdiction to entertain the action, or whether, in view of the provisions of art. 28 of the Law of 1851 relating to "Testaments d'Immeubles" the action should have been brought in the Cour du Samedi, which sits at least once a week in term.

The facts appear from the judgment of the Judicial Committee.

The Inferior Number of the Cour d'Héritage held that it was incompetent to entertain the action.

An appeal by the plaintiff to the Superior Number of the Heritage Division was dismissed by a majority, the Court holding that art. 28 of the Law of 1851 conferred on the Cour du Samedi "seule compétence dans les actions en partage des immeubles d'une succession lorsque ces immeubles auront été légués en tout ou en partie par testament."

1935. Oct. 14, 15. *Le Quesne K.C.* and *H. W. Giffard* (of the Jersey Bar) for the appellant. Down to 1851 all proceedings affecting realty had to be brought, and could only be brought, before the Cour d'Héritage. That jurisdiction is not now exclusive, but on the facts of this case the Cour d'Héritage is the only Court which has jurisdiction. Art. 28 of the Law of 1851 for the first time provided that another Court, the Cour du Samedi, should have jurisdiction in certain matters relating to realty. The Act of 1851 clearly created an exception to the unqualified rule of Jersey law as it existed before that date. The question is, how far does the article go? None of the parties to the dispute is a devisee, and art. 28, properly construed, relates only to an "action en partage" in which one or more of the parties is a devisee, and the words of the article were never meant to apply when none of the parties derived any interest under the will. This case was not dealing with a testamentary disposition, but an hereditary succession, and if it is an hereditary succession the article does not apply. The appellant claims his rights in a succession héréditaire, not under a testamentary succession. *Le Cornu* v. *Falle* (1) may be wrongly decided, or is at all events distinguishable. If *In re Chevalier* (2), which was brought in the Cour d'Héritage, is right, then the decision in the *Falle* case (1) is wrong. In *Chevalier's* case (2) one of the parties was a devisee. In any case the objection to jurisdiction is made too late: There was one action in which there was a series of proceedings; could objection be taken to them in October, 1932, which could have been taken at any time after 1929? *Norwich Corporation* v. *Norwich Electric Tramways Co.* (3) [With regard to the law of Jersey on this matter reference was made to Manuscrits le Geyt, Constitutions Lois et Usages, vol. ii., chap. 39, p. 439; Hemery and Dumaresq, p. 10; Code Le Geyt, Livre IV., Titre 3; and Houard's Dictionnaire de Droit Normand, Ed. 1780, vol. ii., p. 200. Reference was also made to *Godfray* v. *Godfray* (4); *West Suffolk County Council* v. *Olorenshaw* (5) and *In re Pollard*. (6)] The point as to jurisdiction was taken too late, because there were not two separate actions, and it ought to be held that the

(1) Cour du Samedi, Nov. 12, 1904.

(2) Act of Royal Court, Oct. 4, 1888.

(3) [1906] 2 K. B. 119.

(4) (1865) 3 Moo. P. C. (N. S.) 316, 338.

(5) [1918] 2 K. B. 687, 690.

(6) (1888) 20 Q. B. D. 656, 665.

Cour d'Héritage has jurisdiction. The rights of the respondent in the realty in question vested in him and belong to him as principal héritier and are subject to the complementary right of the co-heirs to share in it.

Vaisey K.C., Eric Sachs, and *P. N. Richardson* for the respondent. The point as to jurisdiction is a good one. The terms of art. 28 fit the rather peculiar circumstances to which we seek to apply them. Art. 28 is not confined to the case in which the validity of the will is in direct issue between the parties, but it extends to all cases in which the rights of the parties are derived from the fact that the validity of the will is in question. This is " an action touching the validity " of the will in the sense that if the validity of the will had not been a matter of doubt these present proceedings would never have been brought. We come within both limbs of art. 28. *Le Cornu* v. *Falle* (1) has been followed ever since. As an illustration of exclusive jurisdiction see *Pasmore* v. *Oswaldtwistle Urban District Council.* (2) Art. 28 is not merely declaratory, but is of the essence. It was impossible to say that what the appellant did here was not to start a new action. The Heritage Division, having regard to the provisions of art. 28, has and had no jurisdiction to entertain an action relating to the real property in question, and was right in refusing to entertain it. The respondent does not and never did hold the real property either as " principal héritier " of George Edward Ching or in any such other capacity as would under the laws of the Island of Jersey render him liable to make partition thereof with, or to account for the same to, any other person whomsoever.

Le Quesne K.C. replied.

Nov. 11. The judgment of their Lordships was delivered by

LORD MAUGHAM. The questions which arise for decision upon this appeal are, first, whether the Cour d'Héritage of the Royal Court of Jersey is competent, so far as regards jurisdiction, to deal with the matters involved in the action, and secondly, whether an objection to the jurisdiction of that Court could properly be taken in the circumstances by the respondent, the defendant in the proceedings. Other questions were discussed at the hearing, but, in the view their Lordships take, do not call for consideration or decision.

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(1) Cour du Samedi, Nov. 12, 1904.

(2) [1898] A. C. 387, 394.

The circumstances under which the two questions arise are as follows. George Edward Ching, who has conveniently been described in the proceedings as the de cujus, died in Melbourne, in Australia, on August 8, 1907, possessed of certain immovables in Jersey. By his will, made at Melbourne on June 19, 1888, he left all his real and personal estate, including his immovables in Jersey, to one Elizabeth Hessey. It was alleged in certain proceedings in Jersey, to which reference will shortly be made, that the de cujus was a married man, and that he had lived in a state of concubinage with Elizabeth Hessey, who was not his wife, for many years prior to his death. According to the ancient Custom of Normandy, which, subject to subsequent legislation, prevails in the Island of Jersey, any legacy to a concubine was contrary to law, since by that law " *on ne peut léguer à une concubine* "; and indeed, according to the Custom, all gifts to a concubine were null. Until the year 1851 immovables in Jersey could not be disposed of by will; but by a Règlement or Ordinance passed in that year, the effect of which was considered by this Board in the case of *Nicolle* v. *Nicolle* (1), limited powers of disposing of immovables in Jersey by will were conferred on persons having the capacity of making wills of movables who left neither children nor other descendants. It has not been asserted that the de cujus left any legitimate descendants, and accordingly he had a right, subject to certain formalities as to execution being complied with, to dispose of his immovables in Jersey by will; and it is suggested by the respondent, but denied by the appellant, that, as the result of the Ordinance of 1851, the de cujus was empowered, notwithstanding the ancient law relating to gifts to concubines, to devise such lands to Elizabeth Hessey, even if she was at the date of the will a concubine of the de cujus.

The will of the de cujus was proved by the procureur of

(1) [1922] 1 A. C. 284.

Elizabeth Hessey in Jersey on September 7, 1909, and registered pursuant to an Act of the Royal Court dated October 9, 1909, in the Public Registry of the Island on October 9, 1909. By art. 15 of the Ordinance of 1851 actions to annul wills of immovables ought to be instituted within a year and a day of the Act of the Royal Court ordering the registration of the will. On September 24, 1910, i.e., within the year, the respondent, as procureur of John James Ching, instituted proceedings against the procureur of Elizabeth Hessey to have the will annulled on various grounds connected with its due execution, and also on the ground of the ancient law in reference to concubines. John James Ching under Jersey law was the principal *héritier à la succession collatérale* of the de cujus, and, if the will had been annulled, he would have been entitled, as one of the co-heirs in the succession to the immovables of the de cujus, to a share in such immovables in the Island. The proceedings were instituted in the Cour du Samedi by John James Ching in his capacity as principal héritier. The allegations as to the defects in the execution of the will appear to have failed, or to be likely to fail, and the question as to the alleged concubinage was not decided, for the proceedings were compromised, with the assent of the Court, upon terms set out in an order of the Inferior Number of the Royal Court dated November 16, 1912. In effect, John James Ching agreed to undertake all liability in respect of rents, mortgages, dues and dower charged on the property, and to pay 550*l.* to Elizabeth Hessey; and she on her part agreed to convey, that is (to use the exact words) *céder et transporter à fin d'héritage audit principal héritier* all the rights of Elizabeth Hessey in the said immovables, and to effect this by conveyances passed in open Court. The conveyance was in fact effected by a deed passed before the Bailiff of the Island on December 28, 1912. For reasons which will appear later, their Lordships do not think it necessary to comment upon the terms either of the order of November 16, 1912, or of the conveyance to John James Ching. John James Ching paid the sum of 550*l.* out of his own pocket and entered

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into possession of the property, and he is said to have discharged the charges which existed on it.

There were other collateral heirs of the de cujus, who, on the footing of an intestacy, would have been entitled to a *partage* or partition of the immovables with John James Ching. The appellant, George James Gilbert, was one of these persons, and it is said that he remained ignorant of his alleged rights in the immovables until about 1928; and, an amicable arrangement having failed, he instituted an action in the Cour d'Héritage on May 9, 1929, against John James Ching, in which he claimed that the respondent ought "lui délivrer la juste part dudit Monsr. George James Gilbert de tous les héritages qui furent audit feu Monsr. George Edward Ching et pour cet effet voir appointer Arbitre pour partager lesdits héritages selon droit et usage."

This claim was on the footing of an intestacy. The title of the appellant as an heir was challenged, and certain genealogical inquiries took place before the Greffier, and on July 2, 1931, the Inferior Number of the Cour d'Héritage decided that the appellant had established his heirship. Thereupon the respondent submitted by way of preliminary objections that he was not obliged to plead to the action on three grounds—namely: (1.) that the appellant was wrong in commencing the action as principal héritier of his father Edward Gilbert; (2.) that the appellant was wrong in alleging that he represented his grandmother Elizabeth Ching; and (3.) that there never had been and was not at the time any *succession successorale à partager*.

On January 30, 1932, the Inferior Number of the Court decided in favour of the respondent on all three grounds. There was an appeal to the Superior Number of the Court, whereupon on May 19, 1932, the Court held that the defendant (the present respondent) was not bound to plead in the action "dans sa forme actuelle et l'a renvoyé de l'action, chaque partie devant porter ses frais." In so deciding the Court stated that the judges unanimously agreed with the decision of the Inferior Number on the first and second grounds, but by a majority disagreed with the Inferior Number on the third ground.

The appellant proceeded on October 6, 1932, to take the steps in the Inferior Number of the Cour d'Héritage which have resulted in the present appeal. There is a controversy between the parties whether these steps were of the nature of a new action, or whether they are merely of the nature of fresh proceedings in the action commenced on May 9, 1929. It is therefore material to point out that in the proceedings initiated on October 6, 1932, the nature of which is stated in the order of November 21, 1932, the claim of the appellant plaintiff is formulated as follows: " l'actionnant de lui délivrer la juste part dudit Monsr. George James Gilbert, ès qualités, de tous les héritages dont ledit feu Monsr. George Edward Ching est mort vêtu et saisi ou qui sont subséquemment rentrés entre les mains dudit Monsr. John James Ching en sa qualité de principal héritier dudit feu Monsr. George Edward Ching par quelque voie que ce soit; et pour cet effet voir appointer Arbitre pour partager lesdits héritages selon droit et usage."

It will be noted that the claim is now enlarged to this extent, that the plaintiff is not merely claiming " a delivery of the just part of the heritage of which George Edward Ching died seised," but is claiming in the alternative the delivery of the just part of the heritage which subsequently came to the hands of John James Ching in his quality of principal heir of the de cujus *by whatever means*. The respondent thereupon raised the point that, having regard to the will of the de cujus, which had been registered in the Public Registry of the Island, and to the lapse of time which greatly exceeded the time specified in art. 15 of the Ordinance of 1851, the will must be taken to have its full force and effect. The suggested consequence was that the terms of art. 28 of the Ordinance of 1851 applied, and therefore the action for partition of the immovables of the succession ought to have been instituted in the Cour du Samedi, with the result that the Cour d'Héritage ought to decline jurisdiction. Art. 28 of the Ordinance of 1851 is in the following terms: " Les actions touchant la validité des Testamens contenant des legs d'immeubles seront instituées à la Cour du Samedi, et aussi les actions en partage des immeubles d'une succession, lorsque ces immeubles auront été légués en tout ou en partie par Testament."

The Inferior Number on November 21, 1932, pronounced in favour of the defence. The judgment contains reasons in the form of a statement of the contentions of the defendant followed by the phrase : " La Cour, accueillant la prétention du défendeur, ès qualités, s'est déclarée incompétente dans l'espèce."

The contention of the defendant, to which the Court has thus in substance assented, is stated in the following terms : " Le defendeur, ès qualités, sous la réserve de toutes ses autres prétentions, tant préliminaires qu'au fond, a répondu que la prétention de l'acteur est absolument étrangère à la seule question maintenant devant la Cour, à savoir, celle de la compétence de la Cour d'Héritage dans la présente action. Que si la contention du défendeur à l'égard de la compétence de la Cour du Samedi dans l'espèce, est fondée en droit, il n'y a pas lieu de considérer la portée du jugement du Corps de la Cour dans la présente cause. Que c'est un principe de droit admis et reconnu que même le consentement des parties ne peut conférer une juridiction valable à un tribunal incompétent dans la matière. Qu'il est aussi de principe que le plaid d'incompétence du tribunal peut être soulevé en tout état de la cause, même en appel par devant la Cour d'Appel de dernière instance ; et si l'incompétence est établie, toute la procédure doit tomber. Qu'appliquant ces principes dans l'espèce la prétention de l'Acteur ne contient que des arguments fallacieux et illusoires et ne tend qu'à s'écarter du vrai point en débat. Que d'ailleurs, cette prétention comprend des inexactitudes de fait et d'induction quant à la portée du Jugement du Corps de la Cour lequel même fut-il valide—n'aurait en aucune façon les conclusions tirées par l'Acteur, qui s'est trompé étrangement dans ses inférences, selon lui inéluctables mais qui réellement sont fausses. Qu'en examinant avec soin le jugement du Corps de Cour, il paraît clair que trois points préliminaires avaient été soulevés par le défendeur, que les deux premiers avaient été tranchés par le Nombre

Supérieur en faveur du défendeur, mais que le troisième avait été tranché en faveur de l'Acteur—Or, ce troisième point concluait en termes exprès à ce que le défendeur (pour les raisons émises à l'appui de son troisième point) n'était pas tenu de plaider à l'action. Donc, si l'Acteur eût pu continuer son premier procès, le rejet par le Corps de la Cour du troisième point préliminaire du défendeur aurait eu pour effet de juger que le défendeur devait plaider à l'action c'est à dire sur le fond, ce qu'il n'a pas encore fait. Qu'il est donc erroné et faux de dire que ce jugement équivaudrait à un envoi devant le Greffier Arbitre si les deux premiers points préliminaires n'avaient été décidés en faveur du défendeur. Qu'au contraire, la position véritable est que la décision des deux premiers points préliminaires en faveur du défendeur, impliquait de toute nécessité un renvoi de l'action ; et l'Acteur l'a interprété lui-même de cette façon, puisqu'il a institué une nouvelle action où l'Acteur assume une autre qualité que celle dont il était revêtu dans la première action, et où encore le fond de l'action est élargi et absolument reconstitué. Qu'il est évident que la Cour n'aurait pas pu envoyer les parties devant le Greffier sans permettre au défendeur de plaider sur le fond, ce qui eût été foncièrement illégal, et impliquerait une intention que la Cour dans sa justice, n'a jamais pu avoir. Partant, le défendeur a prétendu que la réponse de l'Acteur ne contient aucun argument valable qui pourrait licitement permettre à la Cour de mettre de côté les termes stricts et exprès de la Loi sur les testaments d'immeubles (1851) invoqués par le défendeur dans sa première prétention préliminaire, et il a demandé respectueusement que la Cour se prononce sur cette prétention."

There was an appeal to the Superior Number, and this Court by a majority, having regard to the circumstances and to art. 28 of the Ordinance of 1851, which they said conferred on the Cour du Samedi " seule compétence dans les actions en partage des immeubles d'une succession lorsque ces immeubles auront été légués en tout ou en partie par testament," affirmed the judgment of the Inferior Number, and dismissed the appeal, and went on to declare that the procedure before

the Cour d'Héritage from the interlocutory judgment of July 2, 1931, was null and void. It is from this judgment that the present appeal is brought.

The first question for consideration is as to the true construction of art. 28 of the law of 1851. It will be observed that the article is to be found in an enactment which for the first time authorizes, subject to conditions, the disposition of immovables by will. The very ancient Court called the "Cour d'Héritage," which, as their Lordships were informed, sits only twice a year, had no original jurisdiction to decide as to the validity of such a will, because prior to the Act of 1851 such wills were unknown. It was therefore necessary in the Act to provide for proceedings relating to the validity of such testaments, and in the opinion of their Lordships, the jurisdiction created by art. 28 was one conferred on the Court known as the Cour du Samedi (which sits weekly), to the exclusion of the jurisdiction of the Cour d'Héritage. There is no reason for thinking that any implied jurisdiction was conferred on the Cour d'Héritage. The original action instituted in the year 1910, being an action seeking to attack the validity of the will of the de cujus, was properly brought in the Cour du Samedi. It was strongly contended on behalf of the appellant that the existing proceedings are not of the nature of an action touching the validity of the will of the de cujus, nor is it an action *en partage des immeubles d'une succession* in a case where the immovables have been devised in whole or in part by will. Their Lordships are unable to take this view. In the present proceedings, if they had been continued, it seems to them that it would have been essential to consider the effect, if any, of the will of the de cujus, followed as it was by the compromise entered into by the respondent. If the will was originally a valid one, either because it was impossible to establish that Elizabeth Hessey was the concubine of the de cujus, or because of the suggested operation of the law of 1851, it is clear that the appellant could not succeed in his quality of a collateral heir claiming ab intestato, which was apparently the basis upon which the proceedings instituted in May, 1929, were founded. The validity of the will was by necessary inference challenged in those proceedings, and it remains one of the contentions in the present proceedings. If, on the other hand, the appellant was driven to contend that he based his claim upon the view that a compromise of a doubtful will entered into by the principal heir in the circumstances in question gave rise to a succession in which he is entitled to a share, it seems to their Lordships that the claim is within the latter part of art. 28, since the claim must start by stating the will and must follow this by setting up the compromise of the principal heir's doubtful rights in such circumstances that he had acquired the immovables in a fiduciary capacity. The claim would still be a claim to a share in the succession in a case in which they had been " légués . . . . par testament." The compromise, of course, was followed by a conveyance; but the conveyance transferred a title to the immovables only on the footing that Elizabeth Hessey had acquired them by the will of the de cujus. The claim on this footing must therefore necessarily begin with an assertion that the immovables had been devised by the will. Their Lordships therefore agree with the judgment both of the Inferior Number and of the Superior Number in this respect.

The next question that arises is whether this point was open to the respondent, having regard to the circumstance that it does not seem to have been raised in the proceedings commenced on May 9, 1929. The question being one of jurisdiction of the Court in regard to the subject-matter of the proceedings, it would be clear, if English law were applicable, that the objection might be taken at any time, and even on an appeal, although it was not raised in the Court of first instance. Indeed it would appear to be pars judicis to take the objection, if it seemed to the Court to be well founded. It is, in our jurisprudence, well settled that parties cannot by agreement, delay, or otherwise confer jurisdiction upon a Court as regards subject-matter, or oust the jurisdiction of another Court: see *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1) There were pressed upon

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their Lordships, however, a number of passages from the works of recognized writers of authority on the laws and usages of Jersey, and other writers on the Droit Normand—passages which seem to show that according to the law and practice of Jersey an objection to the jurisdiction of a Court must be taken at once, and cannot be taken at a late stage in the proceedings: see the Code Le Geyt, Livre IV., Titre 3; a report to the Privy Council dated A.D. 1789 by Hemery and Dumaresq; the Dictionnaire de Droit Normand, Ed. 1780, vol. ii., p. 200; and some writings by Pothier, and other jurists on the more general law. Their Lordships accordingly hesitate to deal with this part of the case on what would be the English view as to an objection of the nature in question, although they observe that in the passage already set out from the judgment of November 21, 1932, it is contended that the plea of incompetence of the tribunal can be raised at any time, and it does not appear that the passages from the above mentioned writers, with which the Court was doubtless familiar, were regarded as an answer to this contention. Their Lordships, however, think it unnecessary to decide this point, as, in their opinion, the appeal fails on another ground. It seems to them that the present proceedings are of the nature of a new action. Not only are the grounds of the action different in the sense of being substantially wider than the single ground on which the proceedings of 1929 were based, but the plaintiff himself claims in a different quality to that in which he assumed to claim in the first proceedings. The contention that the present proceedings are new proceedings was very clearly raised before the Court, as appears from the latter part of the lengthy passage from the judgment of November 21, 1932, above set out, and, since the Court accepted this contention of the defendant, and was of course in a much better position than their Lordships to decide whether the action was in effect a new action or not, it seems to their Lordships impossible to come to a different conclusion from that of both Courts on this question. The passage referred to is to this effect: "The true position is that the decision of the

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two preliminary points in favour of the defendant made a renvoi of the action a matter of necessity and the plaintiff himself interpreted the matter in that way since he instituted the new action in which he assumed a different quality from that with which he was clothed in the first action and where the basis of the action is enlarged and absolutely reconstituted."

It may be observed that the appellant himself, in his pleading in the present case, seems to take the same view, since there is a recital that the plaintiff, having before the majority of the Court in the previous case succeeded upon the third point, "il ne lui restait plus qu'à intenter une autre action où les omisions et fautes signalées par le Nombre Inférieur et confirmées par le Nombre Supérieur, seraient comblées et rectifées." In the result, therefore, their Lordships, agreeing with the Courts of the Island, consider that there were proceedings of a new character commenced by the appellant on October 6, 1932, in which it was open to the defendant to raise the point of jurisdiction founded upon art. 28 of the Law of 1851, and, this objection being a good one, the appeal must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Bennett, Ferris & Bennett.*

[PRIVY COUNCIL.]

TRICKETT . . . . APPELLANT;

AND

QUEENSLAND INSURANCE COMPANY, LIMITED, AND OTHERS . . . . . RESPONDENTS.

J. C.*
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Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Insurance—Motor-car—Driven by insured at night without lights—Damaged or unsafe within exception to policy—Knowledge of insured immaterial—Insurers relieved from liability—Running warranty of roadworthiness—Analogy to seaworthiness of ship at sea unsound.

A general exceptions clause in a private motor-vehicle insurance policy provided that: "No liability shall attach to the Company under this policy in respect of . . . . any personal accident to the insured occurring:—(I.) While any motor vehicle in connection with which indemnity is granted under this policy is:—(*e*) Being driven in a damaged or unsafe condition."

The insured, while driving at night a motor-car covered by the policy, was involved in a collision with another motor-car and was killed. At and about the time of the accident the lights of his motor-car were not shining. On a claim under the policy by the insured's daughter as assignee of the rights under the policy from the legal personal representative of the insured:—

Held, that at the time of the accident the motor-car driven by the insured was in a damaged or unsafe condition within the meaning of the exceptions clause, and that the insurance company was accordingly relieved from liability under the policy irrespective of whether or not the insured was aware at the time of the accident of the damaged or unsafe condition of the car. The terms of the exceptions clause were unambiguous and plain, and there was no justification for supplementing them by adding "to the knowledge of the driver," or for reforming the contract into which the insured had entered.

Held, also, that the position of a motor-car on land cannot be assimilated to that of a ship at sea and the same code of law rigidly applied to both cases so as to make the exceptions clause to the policy only applicable where the motor vehicle was in a damaged or unsafe condition at the beginning of its journey. Such an argument based on the identity of the conditions which govern the seaworthiness of a ship at sea and the roadworthiness of a motor-car on land is unsound.

**Present:* LORD ALNESS, LORD ROCHE, and SIR SIDNEY ROWLATT.

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Reasoning of Goddard J. to the contrary in *Barrett* v. *London General Insurance Co.* [1935] 1 K. B. 238 disapproved.

Judgment of the Court of Appeal of New Zealand [1932] N. Z. L. R. 1727 affirmed.

APPEAL (No. 21 of 1934) from a judgment of the Court of Appeal of New Zealand (November 25, 1932), affirming, by a majority, a judgment of the Supreme Court of New Zealand (May 13, 1932).

The appellant, Marjorie L'Estrange Trickett, was the daughter of one Alfred John Ernest Wiggs, who was killed in a motor-car accident at about midnight on November 17–18, 1930. At the time of his death he was insured with the respondent company under a policy of motor accident insurance. On a claim under the policy by the appellant as assignee from the personal representative of Wiggs of the rights under the policy, the respondent company alleged that at the time of the collision the insured's motor-car was without lights, and was therefore "being driven in a damaged or unsafe condition" within the meaning of one of the general exceptions to the policy under which they claimed relief from liability.

The main question raised by the appeal was whether on the true construction of the policy, in order that the exception should operate, it was essential that the motor-car should have been driven in a damaged or unsafe condition to the knowledge of the insured.

By an order of the Supreme Court the Public Trustee of New Zealand, who was appointed executor of the will of the insured, and one Jack Selwyn Edwin Wiggs, the co-beneficiary with the appellant under the will, were added as defendants to the action.

The facts appear from the judgment of the Judicial Committee.

The Supreme Court of New Zealand (Myers C.J.) found that at the time of the collision the insured's car was being driven with such a defect in the lighting system as to create an unsafe condition of the motor-car; and he held that it was unnecessary for the respondent company, in order to rely upon the exception, to establish that the motor-car was being driven in an unsafe condition to the knowledge of the insured.

Upon appeal the Court of Appeal (Herdman J. dissenting; MacGregor and Kennedy JJ.) dismissed the appeal, which is reported at [1932] N. Z. L. R. 1727.

1935. Oct. 28. *R. K. Chappell K.C.* and *A. T. Denning* for the appellant. To satisfy the exception the respondent company must prove not only the "damaged or unsafe condition" of the car, but also that it was damaged or unsafe to the knowledge of the insured. The evidence is not sufficient to establish an irresistible inference of knowledge. The company has not proved knowledge. There is the further point whether the exception should not be treated as a warranty of roadworthiness which is only applicable at the beginning of the journey or "voyage," that is, analogous to the implied warranty of seaworthiness in a voyage policy of marine insurance. If this is so, the evidence is in the appellant's favour that the lights were functioning properly when the motor-car set out on its journey. On this point see decision of Goddard J. in *Barrett* v. *London General Insurance Co.* (1)

Hon. S. O. Henn Collins K.C. and *John Buckley* for the respondent company. The matter lies in a very small compass. It is said that the general exception (*e*) is ambiguous because it is difficult to answer such questions as "to whom is the condition unsafe?" If there be any ambiguity it certainly is not solved by the addition "unsafe to the knowledge of the driver." The real force of the argument against the respondent company is to say that when exception (*e*) is compared with "loss or damage to motor vehicle" in exception (*d*) it is found that there is taken away by the general exceptions everything that would seem to be given by the cover clause. It is the quality of all exceptions to take away some part of that which would exist but for them. No ambiguity began or could begin until the general exceptions are found to be co-extensive and to cover precisely the same area as the cover in the first part of the policy. It is only by saying that there

(1) [1935] 1 K. B. 238.

is taken away with one hand what has been given with the other that this suggested ambiguity arises. The words of the exception are clear and unambiguous. To read into the exception "to the knowledge of the insured" is tantamount to making a new contract for the parties. Where in the policy the knowledge of the insured is essential to the operation of a general exception it is expressly so stated. On the facts there is ample evidence to support the judgments below.

Dec. 9. The judgment of their Lordships was delivered by

LORD ALNESS. This is an appeal from a judgment of the Court of Appeal of New Zealand, dated November 25, 1932, affirming, by a majority, a judgment of the Supreme Court of New Zealand, whereby judgment was entered for the respondent company.

The issues in the case lie within narrow compass. The appellant, who was plaintiff in the action, and whose title is not in dispute, is a daughter of a retired civil servant named Alfred John Ernest Wiggs. Wiggs was killed in a motor accident on the night of November 17, 1930. At the time of his death he was insured with the respondent company under a policy of motor insurance; and the claim made by the plaintiff in the action was for a sum of 1000*l.*, payable, as she maintained, under the said policy, in respect of the death of her father.

The question in the appeal is whether, in the circumstances under which Wiggs was killed, the respondent company is exempted from liability by reason of one of the exceptions in the policy of insurance.

The policy is dated February 19, 1930. The clause under which the claim is made by the plaintiff is in these terms: "If the insured, whilst between the ages of 16 and 65, shall be injured by an accident sustained in connection with any motor vehicle described in the Schedule hereto, ... the Company shall pay to the insured or his legal personal representative compensation under the following scale:—(*a*) If the accident shall within three calendar months of the occurrence thereof be the direct and immediate cause of the death of the insured, the sum of 1000*l*."

The exception, under which the respondent company successfully resisted liability in the Courts below, is in these terms :—" No liability shall attach to the Company under this policy in respect of any loss, damage or liability occurring or any personal accident to the insured occurring :—(1.) While any motor vehicle in connection with which indemnity is granted under this policy is :—(*e*) Being driven in a damaged or unsafe condition."

The circumstances under which the appellant's claim arises are as follow : About midnight, on November 17, 1930, a motor-car was being driven by the deceased, Wiggs, in a northerly direction, on the Hutt Road, from Petone to Wellington. His car collided with another car, which was being driven in the opposite direction—i.e., in a southerly direction on the Hutt Road—by a Dr. Findlater. As a result of the collision Wiggs was killed.

The respondent company maintained that Wiggs's car was, at the time of the collision, being driven without lights, that it was therefore in an unsafe condition, and that accordingly, under the proviso already quoted, they were relieved from liability under the policy.

All the judges in the Courts below held that, at and about the time of the collision, the lights of Wiggs's car were not shining. In particular, the dissentient judge in the Court of Appeal, Herdman J., in the course of his judgment said : " The learned Chief Justice, in the Court below, found that before the collision took place the condition of the car, so far as its lights were concerned, was unsafe, and that this unsatisfactory state of affairs had existed for some time, at any rate, before the actual impact. The evidence justifies this finding of fact." This finding was not challenged in argument by the appellant's counsel. Indeed he was constrained to admit that it was correct, and justified by the evidence. Mr. Chappell, however, maintained these contentions: (1.) That, in order that the respondent company should escape liability under the policy, it must show, not only that the car was being driven in a damaged or unsafe condition, but also that the driver was aware of that fact; (2.) that it was not established in evidence by the respondent company that the driver of the car was aware of its damaged or unsafe condition; and (3.) that the law affecting the proviso referred to can be assimilated to the maritime law of seaworthiness, and that, on that analogy, proviso (1.) (*e*) applies only where the car was in a damaged or unsafe condition at the beginning of its journey, or that, in other words, there is no running warranty by the driver of the roadworthiness of the car.

Their Lordships proceed to examine these contentions in their order, bearing in mind that the onus is on the respondent company to show that the case falls within an exception to the policy of insurance issued by them. This was recognized in the Court of first instance, where the respondent company led in the proof. On the other hand, it must not be forgotten that the function of an exception to a policy is to limit the liability under it, and to destroy a right which, apart from the exception, would survive.

(1.) Is knowledge on the part of the driver of a car of its damaged or unsafe condition an essential ingredient of proviso (1.) (*e*) of the general exceptions to the policy? The appellant maintained that it is, inasmuch as the proviso is ambiguous in its terms, and is therefore open to the conclusion contended for by the appellant. The proviso being, as the appellant's counsel maintained, ambiguous in its terms, he compared it with exception (*d*) in the policy, under the heading of "Loss or damage to motor vehicle," and contended that, only on the view that his argument upon proviso (4.) (1.) (*e*) was sound, could the provisions of the two clauses reasonably be reconciled. It must be remembered that, in the present case, the defect was not a latent one, which was potentially dangerous. As to the case of a latent defect their Lordships offer no opinion. The car in the case under consideration was actually and de presenti unsafe to drive, because a necessary appliance was not functioning. It was driven after that state of affairs had developed. Unless their Lordships can assume—which they cannot—that in every case which could occur under proviso (*d*) under " loss or damage to car " the general proviso (4.) (1.) (*e*) would also apply and displace it, the suggested repugnancy does not arise.

Their Lordships are unable to take the first step which is essential to the success of the appellant's argument, and to hold that proviso (4.) (1.) (*e*) is couched in ambiguous terms. On the contrary, in the judgment of their Lordships, the terms of the proviso are unambiguous and plain—indeed intractable. Their Lordships cannot find any justification for supplementing the terms of the proviso by adding to it the words " to the knowledge of the driver," as they are invited to do by the appellant, or for reforming the contract into which he entered. It is not immaterial to observe in this connection that, in certain of the other provisos which are adjacent to that with which the Board are concerned, the knowledge of the assured is set out eo nomine, where it is intended that that knowledge should form a condition of the contract between the parties. Their Lordships have in these circumstances no hesitation in rejecting the first contention of the appellant, and in refusing to read into the policy words which are not there.

(2.) If the views above expressed are sound, the second argument propounded by the appellant, which relates to the proved knowledge by the driver of the damaged or unsafe condition of the car, does not arise. Their Lordships however cannot refrain from adding that, on the evidence, they would have great difficulty in holding that the deceased was ignorant of the unlit condition of his car.

(3.) The third point argued by counsel for the appellant is quite independent of the previous two points. His contention depends for its validity on certain dicta of Goddard J. in *Barrett* v. *London General Insurance Co.* (1) All that their Lordships find it necessary to say regarding that judgment is that, while not questioning the conclusion reached by the learned judge on the facts of the case, they find great difficulty in agreeing with the reasons upon which that conclusion was based. They are not able to assimilate, as did the learned judge, the position of a ship at sea with that of a motor-car on

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land, and rigidly apply the same code of law to both cases. For reasons which are too obvious to be stressed in detail, their Lordships think the analogue imperfect and indeed misleading. They are of opinion that the argument based by the appellant on the identity of the conditions which govern the seaworthiness of a ship at sea and the roadworthiness of a car on land is unsound.

In the result, therefore, their Lordships are of opinion that the three contentions advanced on behalf of the appellant fail, that the majority judgment of the Court of Appeal falls to be affirmed, and that the present appeal should be dismissed. They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Montagu's and Cox & Cardale.*

Solicitors for respondents: *Wray, Smith & Halford, for Leicester, Jowett & Rainey, Wellington, N.Z.*

J. C.*
1935
Dec. 19.

[PRIVY COUNCIL.]

PUBLIC TRUSTEE OF NEW ZEALAND APPELLANT;

AND

LYON . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Insurance—Life—Policy issued in Scotland by Scottish insurance society—Insured then domiciled in Scotland—No office or agency of insurance society in New Zealand—Death of insured domiciled in New Zealand—Policy moneys not available to his Creditors—Life Insurance Act, 1908 (*No.* 105), *ss.* 41, 42–63, 64, 65, *sub-ss.* 1, 2, *and* 3; *s.* 66—*Revenue Act,* 1884 (47 *&* 48 *Vict. c.* 62), *s.* 11—*Revenue Act,* 1889 (52 *&* 53 *Vict. c.* 42), *s.* 19.

Sect. 65, sub-s. 2, of the Life Insurance Act, 1908, of New Zealand, provides as follows: "Where a policy-holder dies leaving a will, the policy-moneys shall not be applied in payment of his debts or of any legacies payable under his will unless in and by his will he has by express words specially referring to such moneys declared that the same shall be so applied."

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* *Present:* LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, LORD MAUGHAM, and LORD ROCHE.

Among the assets of a testator who died domiciled in New Zealand, and whose estate proved to be insolvent, was a policy of life insurance for 500*l.* granted to him when a domiciled Scotsman by a Scottish life assurance society which had never carried on business in New Zealand nor ever had any office or agency there. The sum payable on death, including bonus additions, was about 800*l.* By his will the testator gave and bequeathed all policies of insurance on his life to his wife and certain of his children, and made no express declaration therein that the policy moneys were to be applied in payment of his debts. The administrator of the testator's estate having taken out an originating summons to have it determined whether the provisions of s. 65 of the Life Insurance Act, 1908, of New Zealand were applicable to the policy moneys payable under the policy issued in Scotland so as to render such moneys not available for payment of the testator's debts :—

Held, that s. 65 of the Act was applicable to the moneys payable under the policy although the company which issued it did not carry on business in New Zealand or have a secretary or other officer there, and the proceeds of the policy were not therefore available to the New Zealand creditors.

The definition of "company" in s. 41 of the Life Insurance Act is inconsistent with its limitation to such companies as carry on business in New Zealand, nor is such limitation expressed in s. 65, and there is no contextual inconsistency between the relevant adjacent operative sections of the Act and the definition section sufficient to justify an implication of such limitation.

Further, if s. 65 of the Act destroyed the right or title of the New Zealand creditors as against the policy moneys in question those creditors could not have proved in a Scottish administration, even if there had been one, any claim of debt against the policy moneys.

Judgment of the Court of Appeal of New Zealand (1934) N. Z. L. R. 296 affirmed.

APPEAL (No. 83 of 1934) from a judgment and order of the Court of Appeal of New Zealand (April 12, 1934), reversing a judgment of the Supreme Court of New Zealand (July 31, 1933).

The appellant, the Public Trustee of New Zealand, as administrator of the estate of George Douglas Lyon, who died domiciled in New Zealand on August 8, 1932, took out an originating summons on February 9, 1933, for the determination of the following question : "Were the provisions of s. 65

of the Life Insurance Act, 1908, applicable to the moneys payable under Policy No. 173690 issued in Scotland on the life of the testator so as to render such moneys (which form part of the estate of the said testator) not available for payment of his debts." The summons was served upon the present respondent, Sarah Charlotte Lyon, the widow of the testator, as representing her own interest and the interests of four of her children, and on Frederick Clements Page as representing his own interest and the interests of all the other creditors secured and unsecured of the testator.

The testator died domiciled in New Zealand. The sum payable under the policy by the insurers, the Scottish Widows' Fund and Life Assurance Society, was about 800*l*. That Society had never carried on business in New Zealand and had not and never had had any office or agency in New Zealand.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court of New Zealand (Ostler J.) held that the provisions of s. 65 of the Life Insurance Act, 1908, were not applicable to the moneys payable under the policy so as to render its proceeds not available for the payment of the debts of the testator.

An appeal by the present respondent to the Court of Appeal of New Zealand (Myers C.J., MacGregor, Kennedy and Blair JJ., Herdman J. dissenting) was allowed, and the proceeds of the policy were held not to be available for the debts of the testator. The appeal is reported at (1934) N. Z. L. R. 296.

1935. Dec. 2. *Alexander Ross* for the appellant. The Scottish Widows' Fund and Life Assurance Society has never carried on business in New Zealand, or had any office or agency there. The policy money was collected through the High Commissioner in London by the Public Trustee under the provisions of s. 11 of the Revenue Act, 1884, as amended by s. 19 of the Revenue Act, 1889. By his will the testator made a specific bequest of his insurance policies to his wife and four children. Nowhere in the will did he expressly provide for the payment of debts out of the policy moneys. The Insurance Act, 1908, applies only to companies which carry on business in New Zealand. [Sect. 65 (1), and s. 41 (2), the definition section, were read.] The New Zealand Legislature has failed to legislate for policies of the nature of that in question. They could have done so had they so wished. The obvious meaning of the words in sub-s. 2 of s. 65 of the Act, "no policy now issued or hereafter to be issued" is cut down to a policy issued by a company which has a secretary in New Zealand, otherwise the sub-section can have no effect. That sub-section must be read along with the rest of s. 65, and, further, the word "policy" occurs in ss. 64 and 66 of the Act where the context requires that it bear the meaning "policy issued by a company carrying on business in New Zealand."

[LORD BLANESBURGH. Which are the sections which require of necessity that there must be a secretary in New Zealand ?]

Sects. 43–61, in the sense that they are all very much bound up together. The distinction I am drawing is between a company outside New Zealand which has a secretary in New Zealand, and a company which in fact is not only outside New Zealand but never issues policies there, never carries on business there, and has neither a secretary nor agency there. It is possible to apply the provisions of ss. 69–74 to any policy under which money becomes payable in New Zealand.

[LORD THANKERTON. Both the judgments in your favour seem to exclude any use of the definition of the word "company."]

The Schedule to the policy does not say where the policy moneys are payable. The wide words of sub-s. 2 of s. 65 require some limitation, and must be limited to moneys being paid to somebody domiciled in New Zealand. In *Kelly* v. *Selwyn* (3) there were two assignments, and the English Courts gave priority to that assignment which had complied with English law. On a general perusal of the Act the words in s. 65, sub-s. 2, are words which should be read with a limitation upon the definition of "company" in the Act, and that

(1) Post, pp. 172–3.

(2) Post, pp. 173–4.

(3) [1905] 2 Ch. 117.

limitation should include companies which are either established in New Zealand or which are established outside New Zealand but which carry on business in New Zealand and comply with the necessity of having a secretary in New Zealand. [Reference was made to *Twaddell* v. *New Oriental Bank Corporation, Ld.* (1)]

[Lord Thankerton referred to *Provincial Treasurer of Alberta* v. *Kerr* (2), and said that in the present case the law of Scotland would administer not the law of Scotland but that of New Zealand.]

My second argument is that the policy moneys are Scots assets and fall to be administered, so far as the payment of debts is concerned, by the law of Scotland, and are therefore available to creditors, and the surplus after the payment of debts devolves according to the law of New Zealand. I have found no case which decided anything under the Colonial Probates Act, 1892 (55 Vict. c. 6), s. 2. The law, when it is necessary to take an original grant, is given in Westlake's Private International Law, 7th ed., para. 110 (p. 138). Para. 114 was the difficulty in the way on this branch of the argument, but the assets in this case were reduced into possession not in New Zealand, but by the agent of the Public Trustee, who was the High Commissioner here, who reduced them into possession in Scotland. In the authorities the Courts in England and in Scotland have attempted to enforce their jurisdiction over assets which are situated in their country, and they insisted on applying English or Scots law to those assets: *Preston* v. *Viscount Melville* (3); *Cook* v. *Gregson* (4); and *In re Kloebe. Kannreuther* v. *Geiselbrecht.* (5) The New Zealand creditors at the moment are also Scots creditors who have a claim against the Scots assets, and therefore, if these creditors, though they are resident in New Zealand, are recognized by the law of Scotland to be Scots creditors, then the priority given them by Scots law is to prevail. The principle from the three foregoing

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(1) (1895) 21 V. L. R. 171.
(2) [1933] A. C. 710, 721–2.
(3) (1841) 8 Cl. & F. 1, 12.
(4) (1854) 2 Drew. 286.
(5) (1884) 28 Ch. D. 175.

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authorities, which have been confirmed by subsequent cases, is that where an administration has taken place in a country where assets are situated, and the testator is domiciled abroad, the country in which the administration has taken place decides the question of priority of creditors. In New Zealand the Public Trustee has no claim or right to the assets in Scotland by virtue of his grant in New Zealand: the New Zealand law cannot give him a right to collect those assets, that right can only be given to him by the law of Scotland, and that right is given him by the Revenue Act, 1889.

Hon. S. O. Henn Collins K.C. and *John Buckley* for the respondent were not called on.

Dec. 19. The judgment of their Lordships was delivered by

LORD THANKERTON. The appellant is administrator of the estate of George Douglas Lyon, who died domiciled in New Zealand on August 8, 1932, leaving a will dated April 17, 1929, of which probate was granted to the appellant on October 4, 1932.

The estate of the deceased proved to be insolvent, the liabilities amounting to over 4000*l.*, and the assets amounting in value to about 3000*l.* Among the assets there was included a policy of insurance granted to the deceased by the Scottish Widows' Fund and Life Assurance Society for the sum of 500*l.*, the amount payable on his death, including bonus additions, being approximately 800*l.* By para. 5 of his will the deceased gave and bequeathed all policies of insurance on his life at his death to such of them his wife and children, other than his daughter Elizabeth Waugh Lyon, as should be living at his death, and if more than one in equal shares per capita, with a provision for substitution of the children of any such child who might predecease him. The respondent is the widow of the deceased, and, along with four infant children of the deceased, whose interests she represents, are the parties entitled under para. 5 of the will to the bequest of the policy above mentioned.

On February 9, 1933, the appellant took out an originating summons in the Supreme Court of New Zealand, Wellington

District, in which the respondent was named as defendant. By direction of the Court the summons was served upon the respondent as representing her own interest and the interests of the four infant children, and upon Frederick Clements Page as representing his own interests and the interests of all the other creditors secured and unsecured of the deceased. The main question on which a determination was sought was as follows : " Are the provisions of s. 65 of the Life Insurance Act, 1908, applicable to the moneys payable under policy No. 173690 issued in Scotland on the life of the said deceased so as to render such moneys (which form part of the estate of the said deceased) not available for payment of the debts of the said deceased ? " On July 31, 1933, the originating summons was heard by Ostler J., who decided that the provisions of s. 65 were not applicable to the policy so as to render its proceeds not available to the creditors. The respondent appealed from that judgment, and, on April 12, 1934, the Court of Appeal of New Zealand, by a majority (Herdman J. dissenting), allowed the appeal, and decided that the proceeds of the policy were not available to the creditors. The present appeal is taken from that judgment.

The provisions of s. 65 of the Life Insurance Act, 1908, are as follows :—

" (1.) Subject to the provisions of this Act, no policy now issued or hereafter to be issued, the holder of which becomes bankrupt under any law for the time being in force relating to bankruptcy, nor any interest in such policy or in any moneys payable thereunder, shall pass to the trustee in such bankruptcy, or in any way become part of such bankrupt's estate available for distribution among his creditors ; nor shall such policy, or any interest therein, or in any moneys payable thereunder, be capable of being seized or levied upon or taken into execution by or under the process of any Court whatever, or pass under a general assignment of the policy-holder's property, or become available for the payment of debts under an intestacy.

(2.) Where a policy-holder dies leaving a will, the policy-moneys shall not be applied in payment of his debts or of any legacies payable under his will unless in and by his will he has by express words specially referring to such moneys declared that the same shall be so applied.

(3.) Neither a general bequest of a policy-holder's personal estate upon trust for payment of debts or legacies, nor a general direction for the payment of debts or legacies out of any fund of which under any such will the policy-moneys are made to form part, shall be deemed to render any such moneys available for payment of debts or legacies."

In his will the deceased made no express declaration that the policy moneys were to be applied in payment of his debts.

The question at issue arises out of the facts relating to this particular policy. The policy was issued on March 11, 1904, by the Scottish Widows' Fund and Life Assurance Society to the deceased, who, at that time, was a domiciled Scotsman and resident in London. Under the policy 500*l.* and bonus additions were payable to the deceased, his executors, administrators and assigns on the deceased surviving February 28, 1942, or on his death should that event happen previously. The insurers have their head office in Edinburgh, and have never carried on business in New Zealand, nor have they ever had any office or agent in New Zealand.

The appellant maintained (1.) that sub-s. 2 of s. 65 of the Act did not apply to policy moneys due under a policy issued by a company which did not carry on business in New Zealand and have a secretary or other officer in New Zealand, and (2.) that, even assuming that the sub-section did so apply, the administration of the policy moneys fell to be made according to the law of Scotland, by virtue of which they are available for creditors.

The Act of 1908 is divided into two parts, Part I. (ss. 2 to 40) relating to life insurance companies, and Part II. (ss. 41 to 80) relating to life insurance policies. Each part has its own definition section. The definition section in Part II., which is s. 41, provides, so far as is material :—

"41. In this Part of this Act, if not inconsistent with the context :—

'Company' means any person or association, whether incorporated or otherwise, not being established under any Act relating to friendly societies, which issues or is liable under policies as herein defined; and includes companies now or hereafter established out of New Zealand as well as those now or hereafter established in New Zealand, and mutual associations as well as proprietary; and also includes the Government Insurance Commissioner under the Government Life Insurance Act, 1908:

'Policy' means any contract, so long as such contract remains in force, heretofore or hereafter lawfully entered into by a company, the terms of which are dependent upon the contingencies of human life:

'Policyholder,' 'holder of a policy,' and 'holder' mean respectively the person for the time being legally entitled to a policy."

In the opinion of their Lordships the definition of "company" is inconsistent with its limitation to such companies as carry on business in New Zealand; such a limitation would require to be expressed in the definition and it is not so expressed. Nor is any such limitation expressed in s. 65, and therefore the appellant's contention must rest upon an implication shown to arise from an inconsistency of the definitions in s. 41 with the context of the operative sections which are mentioned. Both the learned judges who were in favour of the appellant's contention have held that the definition of "company" and of "policy" must be qualified throughout Part II. Ostler J. held that Part II. relates only to life insurance policies issued in New Zealand or issued elsewhere by a company which was doing business in New Zealand in compliance with a proposal made in New Zealand. Herdman J. held that Part II. related only to policies issued by companies carrying on business in New Zealand; he stated that nothing much was to be inferred from the definitions. But it is a natural inference from the terms of the definition section that there are at least some sections in which the definitions will not be inconsistent with the context, and they should not easily be put aside as inconsistent with the context of every clause.

In ss. 67 and 68 (insurances by parents on lives of children), ss. 69 to 74 (moneys payable under a policy for benefit of minors, etc.), s. 75 (insurances by minors), not only are the provisions consistent with the full application of the definition section, but there seems to be good reason against any limitation such as is suggested. It follows in their Lordships' opinion that any inconsistency of context affecting the provisions here immediately in question must be found within a narrower range. For this reason their Lordships are unable to regard the group of sections (42 to 63), which relate to assignments and mortgages of policies, which appear to affect only companies which have a locale in New Zealand, as within this narrower range, which should at least be confined to ss. 64, 65 and 66, which are grouped under the one heading as relating to the protection of policies that can properly be regarded as within that range.

Under s. 64 protection is given against forfeiture of a policy for non-payment of premiums, so long as the premiums and interest in arrear are not in excess of the surrender value as declared by the company in the statement of its life assurance and annuity business, the preparation of which by the company is prescribed by s. 19 of Part I. of the Act. It would seem clear that this protection could not be effective as against a company which was in no way subject to the jurisdiction of the New Zealand Courts, and the definitions would be correspondingly limited by this context. But the forms of protection provided for by s. 65 are quite independent of that provided by s. 64.

The provisions of s. 65 preclude any recourse by the policy-holder's creditors against his life policies during his life, or on his death intestate or testate, unless, in the latter case, he expressly directs that the policy moneys shall be applied in payment of his debts. There is nothing in the terms of this section to limit the applicability of the definitions. Further, the section is dealing with policies and policy moneys as assets of the policy-holder, and there does not appear to be any reason, in principle, for excluding such policies as the one here in question, which is an asset of the policy-holder, from the protection given by the section. On the contrary there seems every reason why the rights of creditors who ex hypothesi are in New Zealand should be regulated by this section even though the assets come into New Zealand from abroad. But it remains to consider whether the provisions of s. 66, as amended by s. 4 of the Life Insurance Amendment Act, 1925, which fall to be read along with s. 65, provide a context inconsistent with this view. The first three sub-sections of s. 66 present no difficulty; sub-ss. 4 to 8, which largely relate to a policy-holder's bankruptcy in New Zealand, do present some difficulty, but, in the opinion of their Lordships, such difficulty is not sufficient having regard to the clear and unqualified terms of s. 65 as to involve the limitation of the latter. Their Lordships agree with the statement of Kennedy J., who says: "The object of s. 65 plainly is to encourage provision by way of insurance for the person insured and his wife or children, even to the extent of freeing the proceeds of an insurance policy from the claims of creditors. Individuals, and not policies, are the objects of the solicitude of the Legislature. If that be the true view, as I think it is, then there does not appear any reason why protection should apply for the benefit of a policy-holder, his wife or children, in respect of a policy which has been issued in New Zealand or on a proposal made in New Zealand, but should not apply for the benefit of the same person or persons in respect of a policy issued abroad on a proposal there made."

Their Lordships are, accordingly, of opinion that s. 65 is applicable to the moneys payable under the policy here in question.

The appellant next maintains that, even assuming the failure of his argument on the construction of the Act of 1908, the policy moneys are Scots assets and fall to be administered according to the law of Scotland, under which they are available to creditors. Their Lordships are unable to accept this contention. The policy moneys were in fact recovered by the appellant from the Insurance Society without the production of a grant of representation from the Scottish Courts by virtue of s. 11 of the Revenue Act, 1884, as amended by s. 19 of the Revenue Act, 1889, and there was thus no administration in Scotland; they are now being administered in New Zealand.

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The appellant is in this difficulty; if the provisions of s. 65 merely bar the right of recovery in New Zealand, such bar will operate to prevent their recovery in the New Zealand administration, in course of which the present question arises. If, on the other hand, s. 65 destroys the right or title of the New Zealand creditors as against the policy moneys which form part of the estate of a person domiciled in New Zealand then, even if there had been a Scottish administration, the New Zealand creditors could not have proved in the Scottish administration any claim of debt against the policy moneys.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Wray, Smith & Halford.*
Solicitors for respondent: *T. E. Crocker & Son.*

[PRIVY COUNCIL.]

McPHERSON, C. L. (PLAINTIFF) . . . APPELLANT;

AND

McPHERSON, O. L. (DEFENDANT) . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

Canada (Alberta)—Divorce—Irregularity in Procedure—Trial not in Open Court—Decrees Nisi and Absolute—Voidable not void—Expiry of time for appeal—Subsequent remarriage of petitioner—Decrees unassailable—Divorce and Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85, *Imp.*), *s.* 57.

At the trial of a divorce action, which took place during the luncheon interval in the Judges' law library in the Court House at Edmonton, Alberta—not one of the regular Courts in the Court House—neither the judge nor counsel were robed. The judge was attended by the assistant-clerk of the Court and by

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* *Present:* LORD BLANESBURGH, LORD MACMILLAN, and LORD WRIGHT.

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an official shorthand writer, and before taking his seat he announced that he was sitting in open court. The only other persons present throughout the proceedings were the petitioner and his two witnesses, the action being undefended.

Access to the Judges' law library was through a double swing door in the wall of a public corridor. One wing of that door was always fixed, the other, although swinging close, was usually unfastened. On the fixed wing was a brass plate with the word " Private " in black letters. The double swing door opened on to an inner corridor in which, opposite, was a door of the Judges' library. The opening wing of the swing door was unfastened during the trial, and the inner door of the library was kept open throughout. At the conclusion of the proceedings a decree nisi was pronounced, which was subsequently made absolute.

In an action by the respondent in the divorce suit, brought after the expiry of the time for appealing against the decree absolute, and after the petitioner had remarried, seeking to have the decrees nisi and absolute rescinded and set aside on the ground (inter alia) that the trial of the divorce action in the Judges' law library had not been a trial in open court according to law, and that the resultant decrees nisi and absolute were null and void :—

Held, first, that even although the actual exclusion of the public resulted only from the word " Private " on the outer door, the judge on the occasion of the divorce trial, albeit unconsciously, was denying his Court to the public in breach of their right to be present.

Principles in *Scott* v. *Scott* [1912] P. 241 ; [1913] A. C. 417 applied.

Held, secondly, that the resulting decrees nisi and absolute were voidable only and not void.

Principle in *Dimes* v. *Proprietors of the Grand Junction Canal* (1852) 3 H. L. C. 759 applied by analogy.

Inasmuch, however, as the time for appealing against the decree absolute had expired before the present action to rescind the decrees was instituted, and a new status had been acquired by the petitioner remarrying and becoming, as was his present wife, entitled to the protection afforded by s. 57 of the Divorce and Matrimonial Causes Act, 1857, the decree absolute, although originally voidable, had become unassailable.

Judgment of the Supreme Court of Alberta (Appellate Division) [1933] 2 D. L. R. 244, affirmed.

Appeal (No. 25 of 1934), by special leave, from a judgment of the Appellate Division of the Supreme Court of Alberta (February 21, 1933), affirming the judgment of Ewing J. in the Supreme Court of Alberta (December 20, 1932), dismissing a preliminary issue in the action in which the present appellant, Cora Lillian McPherson, claimed to have the decrees nisi and absolute which had been obtained against her by her husband, Oran Leo McPherson, who at that time was Minister of Public Works for the Province of Alberta, rescinded and set aside.

The appellant and O. L. McPherson were married in the United States of America in 1908. Their subsequent matrimonial domicil was in Alberta. On March 17, 1931, O. L. McPherson instituted proceedings for divorce, alleging adultery by the appellant with one Leroy Mattern. The case was undefended. The trial took place on April 22, 1931, in the Judges' law library in the Court House at Edmonton before Tweedie J. A decree nisi was pronounced, which was made absolute on July 28, 1931. In July, 1932, O. L. McPherson married the wife of Leroy Mattern, the co-respondent in the divorce proceedings, she having herself divorced her husband.

On October 11, 1932, the present action was brought by the appellant to have the decrees nisi and absolute set aside on a number of grounds, and for an order for restitution of conjugal rights. After the institution of that action the appellant heard that the trial of the divorce action had been, as she alleged, a secret one. She thereupon amended her statement of claim and claimed that the whole divorce proceedings were void. The issue as to the alleged secret trial raised by the amended allegation was directed to be tried as a separate issue.

The facts appear from the judgment of the Judicial Committee.

The Supreme Court of Alberta (Ewing J.) held that the divorce trial had in fact been held in open court.

An appeal to the Appellate Division of the Supreme Court of Alberta (Harvey C.J.A., Clarke, Mitchell, Lunney, and McGillivray JJ.A.) was unanimously dismissed. The appeal is reported at [1933] D. L. R., vol. 2, 244.

1935. July 18, 19, 22 and 23. *Wilfrid Greene K.C.*, *Horace Douglas* and *R. O. Wilberforce* for the appellant. The question for determination is one of the very greatest importance from the point of view of the proper administration of justice.

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Facts will be established to show that the trial of the divorce action was heard in secret. If a judge withdraws himself from the proper public court appointed for the hearing of trials, and deliberately sits in a place where the public will not find him, is he acting as a judge at all, or, as Lord Haldane said in *Scott* v. *Scott* (1), does he demit his capacity as a judge and cease to be a judge? The obligation to sit in public in open court is so fundamental in our conception that the matter is but rarely dealt with in the books. Where it has been dealt with it has been pronounced to be not a mere rule of procedure, the departure from which is irregularity, but to be fundamental in our constitution. It has been said by the very highest authority that, whereas in an ordinary civil action a judge by consent of the parties may hear a case in private, in which case he ceases to be a judge and becomes a mere arbitrator operating under a consensus, it is not open to a judge to adjudicate in matters affecting status as an arbitrator, and he cannot therefore sit in private in a matter of that kind. The two main contentions against the appellant were, first, that when matters of divorce are being dealt with the decree absolute is a thing which cannot be gone behind. That proposition is contested fundamentally by the appellant, because the decree absolute, if it is based on an invalid decree nisi, is itself a nullity. The other main contention against the appellant was that the matter was a mere irregularity in procedure, giving a right, perhaps, on appeal, to an order for a new trial, and was not one of those things so radical as to vitiate the entire proceedings, leaving it for any other Court to ignore the judgment. If a Court has pronounced a decree or order which is void, the person against whom it is pronounced may disregard it, and it is the duty of every other Court to disregard it; it is a nullity, and it is competent for the person affected by it to take proceedings to have it so declared. That is what is being done here.

The issue is, What is the effect of the secret trial? There was one reason, and one only, why the judge held the trial in the Judges' library; it was to avoid publicity for a public man. The judge had no authority or jurisdiction to do what he did. He declared "I am sitting in open court," but no member of the public could have had any suspicion whatever that justice was being administered there. To make it an open court there would have to be something even more than the removing of the word "Private" from the door to the public corridor, there would have to be a specific notice to the public indicating where they would find the action being heard. It was more than a hearing in camera, because in that case there would be a notice displayed, "In Camera." This was a case attended by no trace of publicity. There is a general absence of authority on this question because it is so fundamental a matter. It is accepted that but for specific powers there cannot be a hearing in private at all. The finding of fact in this case is one which cannot possibly stand.

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(1) [1913] A. C. 417, 436.

With regard to the legal position in Alberta in respect of divorce, the present Province of Alberta was formed out of the old North-West Territories by a Dominion Act, the Alberta Act, 1905 (4 & 5 Edw. 7, c. 3), subsequent to the federation. The statute governing the legal system in the North-West Territories before Alberta became part of them was the North-West Territories Act, 1886 (49 Vict. c. 50), and under that Act the English law relating to civil and criminal matters as on July 15, 1870, was declared to be the law in force in the North-West Territories. Divorce was a matter of the Federation and not of the Provinces. [Reference was made to the Alberta Act, 1905, and the North-West Territories Act, 1886, and it was explained how those Dominion Acts formed part of the law of Alberta and to what extent they were still parts of that law.] Sect. 11 of the North-West Territories Act, 1886, was a distinct statutory section directing the use of open court. [Reference was also made to the Jury Act (Alberta), 1921, c. 8, s. 48 of which repealed ss. 71 and 88 of the North-West Territories Act, 1886; to s. 24 of the Supreme Court Act (Alberta), 1907, c. 3, which provides for the making of Rules; and to the Judicature Ordinance (North-West Territories), 1898, c. 21, ss. 3, 5; and to Ord. 40 of the last-named Ordinance, which deals with sittings in Chambers.] The Judicature Act (Alberta), 1919, c. 3, dealt with a large number of matters which are dealt with in the Ordinance of 1898: s. 59 repeals the Judicature Ordinance of the old North-West Territories, and it also repeals the Supreme Court Act, 1907, substantial parts of which are re-enacted into this Act of 1919. Again, the Judicature Act, R.S.A., 1922, c. 72, re-enacts the Judicature Act, 1919, and was the governing statute at the relevant time. It provided for the constitution of the court, and the powers and privileges of the judges. It is, in effect, a consolidating statute.

The Imperial Divorce and Matrimonial Causes Acts, 1857 (20 & 21 Vict. c. 85), and 1860 (23 & 24 Vict. c. 144), were in force in Alberta at the relevant time. There was no power in any of the Judicature statutes relating to Alberta, or in any of the Rules of Court made thereunder, to hear trials of cases in camera or otherwise than in open court. [Reference was made to ss. 30, 31, 43, 46, 49, 53 and 57 of the Divorce and Matrimonial Causes Act, 1857.] Under s. 46 of that Act witnesses have to be examined in open court subject to rules provided. There have been no such rules provided. In *Scott* v. *Scott* (1) it was said that so fundamental is the rule of open court that those words were not to be read as empowering the making of rules dispensing with that necessity. [Reference was made to ss. 4, 5 and 7 of the Divorce and Matrimonial Causes Act, 1860.]

Rule 8 of the Alberta Rules of Court provides that " Except as otherwise provided all motions, applications and hearings other than the trials of actions may be disposed of by a judge in chambers;" and in r. 393 there is a provision that witnesses at the trial of an action shall be examined in open court. Rule 6 of the Alberta Divorce Rules states that application for a decree absolute " may be made to any judge sitting in Court."

[Lord Blanesburgh. It seems on these rules that this proceeding was a matter which could not be heard in private. All the trials of actions shall be public.]

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(1) [1913] A. C. 417.

One of the points taken by the respondent is that this was nothing more than a failure to comply with some procedural rule, and merely had the effect of the order made being voidable only, and not void, and r. 273 of the Alberta Rules of Court, which corresponds with Ord. 70, r. 1, of the English Rules of Court, is relied upon. Rule 273 provides that: "Unless the court or a judge so directs, non-compliance with the Rules shall not render any act or proceeding void, but the same shall be set aside either wholly or in part as irregular or amended or otherwise dealt with as to the court or judge may seem just." It is suggested that what happened in this case was a mere irregularity arising from non-compliance with the Rules, and is not such a thing as avoids the proceedings unless the judge so directs. There have been a large number of cases under the corresponding rule in England, and the question which has always arisen is whether it is a case of an irregularity such as the rule contemplates, which can be set right, or is a thing so fundamental that it goes to the root of the jurisdiction and cannot be set right. That distinction has been drawn, and the basis on which the English cases have proceeded is that where the breach of the rule is one which can be lawfully waived by the other party it is fit subject-matter for this rule, but if it is one which cannot be waived then the rule has nothing to do with it. Applying that view to the present matter, in a case affecting status the breach of the rule could not be waived by consent. The trial not having taken place in open court, the matter is utterly outside the Rules altogether. The following authorities deal with Ord. 70, r. 1: *Smythe* v. *Wiles* (1); *Smurthwaite* v. *Hannay* (2); *Anlaby* v. *Prætorius* (3); *Hewitson* v. *Fabre* (4); *Fry* v. *Moore* (5); and *Hamp-Adams* v. *Hall.* (6) There is also a very convenient summary of the type of cases in which Ord. 70, r. 1, was invoked and applied in Halsbury's Laws of England, 1st ed., vol. xxiii., 144, footnote (*a*). *In re Portsmouth* (*Lord*) (1) shows what the old Chancery practice was. The Office of Master in Chancery was abolished by Act 15 & 16 Vict. c. 80.

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(1) [1921] 2 K. B. 66.
(2) [1894] A. C. 494, 501.
(3) (1888) 20 Q. B. D. 764.
(4) (1888) 21 Q. B. D. 6.
(5) (1889) 23 Q. B. D. 395.
(6) [1911] 2 K. B. 942.

In *Scott* v. *Scott* (2) the President had made an order for the hearing of a nullity case in camera. Subsequently the husband moved to commit his wife for contempt of Court, she having sent out to his family a shorthand note of the proceedings. It was held to be a contempt in the lower Court and in the Court of Appeal. The House of Lords reversed the Court of Appeal by a majority, and held that there was no jurisdiction to sit in private and therefore there could be no question of contempt. The decree in that case must be a nullity, but it remained on the record ; if it was a nullity it could be disregarded. What a Court does without jurisdiction is a nullity. [Reference was also made to the *Trial of the Duchess of Kingston.* (3)]

The authorities under Ord. 70, r. 1, have a very close bearing on this. Prima facie, non-compliance with a rule of procedure would render the procedure void, and any judgment obtained not in accordance with the rules of procedure would be a nullity. Ord. 70, r. 1, which is the same as r. 273 of the Alberta Rules, states that non-compliance with the rule shall not make a proceeding void unless the judge so directs, and there is power in the Court to waive the breach of the rule. There are many cases under that rule where litigants have tried to save their judgment under the rule, but the Court has held that the judgment is void. It would be an unfortunate slip in procedure if proceedings were to be made void without discretion in the judge, but without that rule the proceedings would be void. What is now being dealt with is something much more fundamental than, and which far transcends, any rule of court. In *Scott* v. *Scott* (4) Vaughan Williams L.J. and Farwell L.J. referred in very strong language to this rule of open court, the former said (4) : " . . . . but I do feel that the hearing of trials in public is so precious a characteristic of English law . . . ." ; the latter that (1) : " . . . . the open and public hearing and determination of suitors' rights and complaints is the salt of the constitution ; . . . ."

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(1) (1815) G. Coop. 107; 35 Eng. Rep. 495.

(2) [1912] P. 4; 241; [1913] A. C. 417.

(3) (1776) 20 St. Tr. 355, 478.

(4) [1912] P. 241, 260.

[Lord Blanesburgh. The rule is so fundamental that its waiver in any case is not to be left to the discretion of any judge ?]

That is so. In the House of Lords in *Scott* v. *Scott* (2) Lord Haldane (2) and Lord Halsbury (2) also used very strong and striking language to that effect. It is quite impossible to treat the departure from that rule as a mere irregularity. The judge had no jurisdiction to hear the case otherwise than in open court. The jurisdiction of a judge to sit as a judge is dependent upon his sitting in open court. So far as the findings of fact are concerned this judgment ought not to be allowed to stand, and the case should be dealt with on the footing that the hearing was not one in open court as required by law.

On the language used in *Barnett* v. *Barnett* (3) and in *H.* v. *C.* (4) the judges in those cases said that they had no power to sit otherwise than in open court. In *Rex* v. *Lewes Prison* (*Governor*) ; *Doyle, Ex parte* (5) it was held (5) that the words " open court," " do not include a Court where the public are excluded," and *Scott* v. *Scott* (2) was followed. On the facts the *Lewes Prison* case (5) fell within the exception to the rule of open court. *Lawrence* v. *The King* (6) was a case where a fundamental rule of procedure was violated.

Other cases on the " open court " point, which come in from a rather different angle—including the question of the fair reporting of proceedings in open court—are *Dimes* v. *Proprietors of the Grand Junction Canal* (7) ; *MacDougall* v. *Knight* (8) ; *Kimber* v. *The Press Association* (9) ; and *In re The Sheriff of Surrey* (10) ; *B—, In re* (*an alleged lunatic*) (11)

(1) [1912] P. 241, 287.
(2) [1913] A. C. 417, 439, 442.
(3) (1859) 29 L. J. (P.) 28.
(4) (1859) 29 L. J. (P.) 29.
(5) [1917] 2 K. B. 254, 255.
(6) [1933] A. C. 699.
(7) 3 H. L. C. 759.
(8) (1889) 14 App. Cas. 194, 206.
(9) [1893] 1 Q. B. 65.
(10) (1860) 2 F. & F. 236.
(11) [1892] 1 Ch. 459.

refers to the difference between a judge sitting in open court and a judge in chambers. There is no sort of half-way house, in which a judge not exercising his chambers jurisdiction can exercise his court jurisdiction out of court. Another aspect of this case is the question of the effect of judgment obtained by fraud: see *Earl of Bandon* v. *Becher* (1) and *Shedden* v. *Patrick.* (2)

As to the statutory provisions, apart from any common law rule, s. 46 of the Divorce and Matrimonial Causes Act, 1857, directing the hearing of evidence in open court, is an Imperial statute, it has not been repealed, and no rule has been made which would dispense with that necessity in Alberta. Again in s. 88 of the North-West Territories Act, 1886, there is an imperative direction as to hearings in open court. There is no repeal in terms of that section in the Alberta statute book, except in the Jury Act, 1921. These statutory provisions relating to the administration of justice are preserved by the Judicature Act (Alberta), 1919, and the Judicature Act, R.S.A., 1922.

Quite apart from statutory provisions, which are merely declaratory of the common law, the common law itself demands that justice shall be administered in open court. Lord Haldane, when he stated in *Scott* v. *Scott* (3) that a judge who sits in private " demits his capacity as a judge and sits as an arbitrator " was laying down something which he understood to be the law. The fact that a judge holds the office of judge does not mean that whenever he purports to administer justice he is acting as a judge. If he does not administer justice according to law he is not acting as a judge at all.

[Reference was made to the publications of the Selden Society, " Select Cases in the Star Chamber, A.D. 1477–1509," Vol. 16, where I.S. Leadam, at p. lvi. of the Introduction, quoting from " Scofield, p. 59 " (4), said: " The capital distinction between the two [the Star Chamber and the

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(1) (1835) 3 Cl. & F. 479, 509.

(2) (1854) 1 Macq., 535.

(3) [1913] A. C. 417, 436.

(4) C. L. Scofield, Studies in Court of Star Chamber, Chicago, 1900.

Council] was that the Council heard causes in private; the Star Chamber was, as Bacon phrased it, 'an open Council' or public court."]

S. B. Woods K.C. (of the Alberta Bar) and *Frank Gahan* for the respondent. The issue is whether the decree nisi is void absolutely because of the alleged hearing in a private room, and if it is void, whether the decree absolute is also void. The making of the decree absolute was regular in every respect. There are four propositions of law: (1.) The decree absolute is valid until it is set aside, and this would be so whether the decree nisi is good and valid or bad and invalid; (2.) the decree nisi is valid until it is set aside; (3.) neither classical nor judicial authority justifies or supports the position that a judge acting as Tweedie J. is admittedly shown to have acted thereby ceases to exercise judicial functions. Even if the decree nisi be invalid that fact does not make void the decree absolute, but only renders it voidable; (4.) it is contrary to fundamental principle that any judgment should be given affecting the status of the present wife in proceedings to which she is not a party.

According to the law of Alberta, if not according to the general law, this proceeding was tried and determined in open court. To understand completely and deal with these propositions of law, it is essential to have an exact knowledge of what law was brought into force in Alberta by the North-West Territories Act, 1886. The English law which was introduced in 1886 and continued in force by the Alberta Act, 1905 (4 & 5 Edw. 7, c. 3), did not include any portion of the English law relating to procedure. It was the substantive law only, the right to dissolve marriages and such other substantive provisions of the Divorce and Matrimonial Causes Act, 1857, that were introduced by s. 11 of the North-West Territories Act, 1886. [It has been decided by this Board that the procedural portion of the Act of 1857 was not introduced by the Act of 1886.] That is the foundation of the argument. By s. 41 the Supreme Court of the North-West Territories was formed. Whether a section similar to s. 11 of the North-West Territories Act, 1886, carried

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into British Columbia the English substantive law came before this Board in *Watts and Attorney-General for British Columbia* v. *Watts.* (1) That is the first decision of this Board that the English substantive law was imported into British Columbia. The matter rested there until after the War. In 1919 two cases came before this Board, one from the Province of Manitoba, *Walker* v. *Walker* (2), and the other from Alberta, *Board* v. *Board* (3), which showed that the procedural portions of the relevant statute were not introduced at all.

[*Wilfrid Greene K.C.* That is disputed.]

This procedure by way of decree nisi introduced into Alberta is procedure.

[LORD BLANESBURGH. Everything in relation to the decrees nisi and absolute is procedural and is not brought into the law of Alberta by the Act of 1886 ?]

That is the contention, and the next question is, How is it brought into Alberta ? The procedure relating to decrees nisi was introduced by Rules made by the judges themselves shortly after the case of *Board* v. *Board.* (3) [Reference was made to the Alberta Divorce Rules, and to the forms of the decree nisi and absolute.] If it is sought to show cause why a decree should not be made absolute, and suppose the judge finds that cause has not been shown, then the way to get rid of that decree under those circumstances is to appeal against it : it could not be suggested that it would be a null and void decree.

[LORD BLANESBURGH. Supposing it had been decided that there was no hearing at all, would the decree absolute be good ?]

Yes, because it is recited and made a fact, and that fact must be appealed against. If a judge, subsequently upon an application for a decree absolute, found in fact that there had been a decree nisi pronounced, that finding of fact by him might be completely erroneous—one that he should not have made, or had no justification for making—but it is

(1) [1908] A. C. 573.
(2) [1919] A. C. 947.
(3) [1919] A. C. 956.

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just the same as any other finding of fact, and while it stands it is good: *In re Padstow Total Loss and Collision Assurance Association; Ex parte Bryant.* (1)

[Lord Blanesburgh. That is a very striking case, because Mr. Greene was unable to find any authority for the rule that, where a Court ought to have sat in public and did not, its decree was declared to be a nullity. That case goes some way towards showing that it is not a nullity.]

[Lord Macmillan. Where a judge has assumed jurisdiction which he did not possess, and on appeal it is held that he had no jurisdiction, is his judgment treated as a nullity, if so, how can you appeal against it? You get a most curious logical dilemma.]

If the question whether the state of facts exists or not depends upon a judgment of the inferior Court, then, if they make a wrong conclusion as to those facts, it is a conclusion come to in the course of the exercise of their discretion, and can be set aside on appeal: *Colonial Bank of Australasia* v. *Willan.* (2) The remedy is to set aside the order absolute on appeal: while it stands it is good: *Rex* v. *Nat Bell Liquors, Ld.* (3)

If it is right that there were no procedural matters introduced from the relevant English Acts into Alberta, and the only procedure is under the Alberta Divorce Rules, a non-compliance with the Rules does not make the proceeding void, but only renders it voidable by virtue of r. 273 of the Alberta Rules of Court (the same as Ord. 70, r. 1, of the English Rules of Court). It is voidable by the process of appeal. *Anlaby* v. *Prætorius* (4); *Smurthwaite* v. *Hannay* (5); *Smythe* v. *Wiles* (6); *Hewitson* v. *Fabre* (7); and *Fry* v. *Moore* (8), to which Mr. Greene referred on Ord. 70, r. 1, do not impinge on my submission that in this case there was merely a non-compliance with a rule of procedure which, in terms of r. 273, does not render the proceeding void, and

(1) (1882) 51 L. J. (Ch.) 344.
(2) (1874) L. R. 5 P. C. 417.
(3) [1922] 2 A. C. 128.
(4) 20 Q. B. D. 764.
(5) [1894] A. C. 494, 501.
(6) [1921] 2 K. B. 66.
(7) 21 Q. B. D. 6.
(8) 23 Q. B. D. 395.

the whole issue in this case is whether the proceeding was void.

In the *Trial of the Duchess of Kingston* (1) the language of the Attorney-General in argument, and of the Lords in their opinion, carries the conclusion that a judgment so obtained by fraud might be avoided and set aside, but that it was not a nullity. *Jonesco* v. *Beard* (2) also supports that view. [On the point of judgments obtained by fraud reference was also made to *Hip Foong Hong* v. *H. Neotia & Co.* (3) and *Cole* v. *Langford.* (4)] If the appellant is right in this case the respondent has not had his divorce action tried at all. There is no analogy between such a case as this and the case of an action which is a completely fictitious proceeding and indeed no proceeding at all.

Dimes v. *Proprietors of the Grand Junction Canal* (5) is of the utmost importance on the question whether the decree nisi is voidable or void. The appellant claims that it is void ab initio because of the circumstances under which the divorce action was tried. The order nisi is voidable only and is a good foundation for the decree absolute. Under s. 57 of the Divorce and Matrimonial Causes Act, 1857, if there is a decree absolute dissolving a marriage, and if there is no appeal against that decree, or if the time for appealing against it has expired, or if an appeal has been taken and dismissed, then the effect of that statute is to give to both the parties the status of unmarried people—s. 57 is substance, not procedure—and if the man married again, as in this case, that statute would make it impossible for anybody to avoid that decree. If his first divorce were to be avoided the result would be that he would have two legal wives, which is not possible in English law. [Sect. 57 of the Act of 1857 was read.]

It cannot be denied that in the light of the language in *Scott* v. *Scott* (6) a trial of an action must be in open court. There must, however, be some limit to that, it cannot mean that all parts of a trial must be in open court: in Canada probably no reserved judgments are delivered from the Bench.

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(1) 20 St. Tr. 355, 478.
(2) [1930] A. C. 298.
(3) [1918] A. C. 888.
(4) [1898] 2 Q. B. 36.
(5) 3 H. L. C. 759.
(6) [1913] A. C. 417.

[Lord Blanesburgh. There is this difference in principle between *Scott* v. *Scott* (1) and the present case, that in this case the judge never declared that he was sitting in camera, he said exactly the opposite.]

It cannot be said that what Tweedie J. did in this case resulted in his order being a nullity. *Scott* v. *Scott* (1) is not an authority supporting the appellant's case, but properly regarded, and looking at the totality of the language used, is a strong authority to the contrary. The actions of the judge in this case did not deprive him of judicial functions. In *Dimes* v. *Proprietors of the Grand Junction Canal* (2) Parke B. gave as his reasons for not holding the decree void, but only voidable, that the consequences of holding it void "would create great confusion and inconvenience," and that it was to the interest of justice that it should not be done. Assume that the present appellant, after the decree absolute, and upon the faith of that decree absolute, had married again, and that there were issue of that marriage: is it conceivable that years afterwards her second husband could say to her: "You are not my wife, these are not legitimate children," it being remembered that the appellant was no party at all to the proceedings before Tweedie J.—she did not appear and did not demand notice, consequently she would know nothing about what happened. There appears to be no authority to justify the conclusion in law that a judge who acts, assume for this purpose, contrary to the principles laid down by the House of Lords in *Scott* v. *Scott* (1) thereby abrogates his judicial functions and becomes not a judge.

[Lord Macmillan. It is necessary that there should be publicity in the sense that the public are not excluded from the particular place where the judge is exercising his judicial functions. The only feature to my mind which is crucial in the present case is the fact that the public access to this place had on it a notice that it was not a public place, and

(1) [1913] A. C. 417.

(2) 3 H.L.C. 759.

that any person who came in was a trespasser. A judge cannot go into court and say: "Lock the doors, I am now sitting in open court," or put up a notice: "Private." It is perfectly obvious that minimizing publicity is one thing, while preventing it altogether is another.]

In the narrow sense of the term "open court," in the Province of Alberta at all events, whatever it may be in England, the present case in the circumstances in which it was held was heard in open court. Sect. 88 of the North-West Territories Act, 1886, provided: "Every judge of the Supreme Court shall have jurisdiction, power and authority to hold courts, ... at such times and places as he thinks proper . . . . and such Courts shall be open public Courts."

[Lord Macmillan. You say that any place in which the judge thinks proper to hold a court shall be deemed to be an open public court. The reading I should prefer is: "and such place that the judge thinks proper shall be open and public."]

The public had a statutory right to go into the Judges' law library, even if it were placarded with "private"; the public have a statutory right to go into any place where the judge has decided to hold his court. Lord Reading in *Rex* v. *Lewes Prison* (*Governor*); *Ex parte Doyle* (1) said: "I think the words 'open court' mean a court to which the public has a right to be admitted."

The next matter is, assuming that the case has not been heard in open court, does that denude the judge of judicial functions? There is no affirmative authority to show that the judge was exercising his judicial functions, but *Lawrence* v. *The King* (2) is an authority, negatively, which indicated a view in support of the contention that the judge was not denuded of his judicial functions.

The only other line of cases of any assistance are those where actions have been brought against magistrates for excluding members of the public from the court: *Daubney* v. *Cooper* (3) is an example.

(1) [1917] 2 K. B. 254.
(2) [1933] A. C. 699.
(3) (1829) 10 B. & C. 237.

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The last point, and one on which there appears to be no authority, and one fundamental in the administration of justice, is that where, as in this case, the status of the present wife is directly affected, it cannot be said that she can have that status changed, or a judgment given in any proceeding at all, without her being entitled to be heard and to urge her own considerations to show that it should not be done.

Wilfrid Greene K.C. replied. The argument on the substantive and procedure law is without foundation; this matter is part of the substantive law: *Board* v. *Board.* (1) The law of divorce which was carried into the North-West Territories Act, 1886, and from there into the law of Alberta, was not a matter which the Alberta Legislature was competent to deal with, it was Dominion matter: and so far as that law is substantive law it does not fall within any rule-making power at all.

On the question of appeal from fact, it has been suggested that there are two independent decrees, and that all the judge has to do is to make a decree absolute, which is in fact a decree. His only jurisdiction is to make absolute something which exists. There is no power at all to grant a decree absolute in the absence of a decree nisi. They are not two decrees, they are the confirmation of one decree; the decree absolute is part of the same thing as the decree nisi: *Lewis* v. *Lewis* (2) and *Norman* v. *Villars.* (3) The judge had no jurisdiction to confirm what was a nullity, and no question of appeal arises, because it is something which was done without jurisdiction: per Lord Tomlin in *Harman* v. *Official Receiver, the Petitioning Creditors, and the Trustee* (4): " If it [the order] was a complete nullity it is difficult to see where the jurisdiction of your Lordships' House to deal with it lies; . . . ." Reliance was placed on s. 57 of the Divorce and Matrimonial Causes Act, 1857, and it was said that after remarriage the decree absolute cannot be got rid of; but that is assuming the existence of a valid decree absolute.

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(1) [1919] A. C. 956.
(2) [1892] P. 212, 216.
(3) (1877) L. R. 2 Ex. D. 359.
(4) [1934] A. C. 245, 251.

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Dec. 16. The judgment of their Lordships was delivered by

Lord Blanesburgh. Questions of wide general importance—of interest in some of their aspects to the whole Dominion and even beyond—are raised by this appeal from the Supreme Court of the Province of Alberta. The questions discussed in the judgments appealed from are concerned with the degree of publicity called for at the trial of divorce suits—in particular, undefended divorce suits in the Province: their Lordships, however, will have to deal, in addition, with the effect upon a decree nisi made at such a trial, and upon a decree absolute following thereon, when it is shown—as in this case is alleged—that the proceedings at the trial were devoid of sufficient publicity—were, in short, not held in "open court."

The facts which raise these questions are not in the present case in dispute, and may be stated as follows: The appellant and the respondent—they will throughout be generally so referred to—were married on April 17, 1908, in the United States. Their subsequent matrimonial domicil, however, was in Alberta. They lived at Edmonton, where they must have been prominent citizens—the respondent in 1931, being, or shortly afterwards succeeding to the office of, Minister of Public Works for the Province.

On March 17, 1931, he instituted in the Supreme Court of Alberta, divorce proceedings against his wife. He accused her of misconduct with one Leroy Mattern. She made no answer to the charge. She put in no defence. She filed no demand of notice. Accordingly, the action was appointed for trial without further intimation to her. It was tried on April 22, 1931, by Tweedie J. sitting in the Judges' law library of the Court House at Edmonton. The learned judge, on that day and in that place, after taking the evidence of the respondent and of two witnesses called on his behalf, pronounced a decree nisi, and gave to the respondent the custody of the four children of the marriage—all of them sons, the youngest then a boy of seven. It is not unlikely, if one may judge from passages in the record, that the retention by the respondent of the custody of that youngest son lies at the root of much of the later troubles between the parents.

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In due course, however, there having been no intervention by the appellant or any one else, the decree nisi was by decree of July 28, 1931, made absolute, and the marriage between the appellant and respondent was, at least apparently, finally dissolved, with this statutory result, that, after the time for appeal had expired, it became lawful for both parties to marry again as if their prior marriage had been dissolved by death—all in terms of s. 57 of the Matrimonial Causes Act, 1857—a section which has always been part of the law of Alberta. And of that privilege the respondent in due course availed himself. In July, 1932—long after the time for any appeal from the decree absolute had expired—he married Mrs. Mattern, the former wife of Leroy Mattern already mentioned. She had obtained a divorce from her husband on account of his misconduct with the appellant. Three months after the respondent's marriage to Mrs. Mattern—in October, 1932—the appellant commenced against him the action out of which this appeal proceeds.

As originally framed, the action was not directed to the questions with which their Lordships are now alone concerned. Its claim was to have rescinded and set aside the decrees nisi and absolute obtained by the respondent in the divorce action on the allegations, in effect, that these decrees had resulted from the respondent's perjury in stating in evidence at the trial that there had been no collusion between himself and the appellant whereby the necessary evidence of her adultery had been obtained, and that there had been no condonation of that adultery.

In the statement of claim as first delivered, it is recorded, almost casually, that the trial at which these alleged false statements were made took place in the law library of the Court House at Edmonton. But none of the relief asked is grounded on that statement. Moreover, it is important to observe that the relief so far claimed was based upon the footing that the impugned decrees were voidable only, and that the intervention of the Court for their rescission was necessary. It was not until November 13 following that the questions now in contest were raised by amendment: then for the first time was it alleged that the trial of the divorce action in the library was not a trial in open court—and as a result that the decrees in question were actually null and void—an allegation and a claim of peculiar seriousness not only to the respondent, in view of his second marriage, but to the wife of that marriage, who, be it noted, is no party to this appeal.

By order dated November 28, 1932, this new issue was directed to be tried before the earlier issues in the cause. And it has been so tried, with the result that by an order of the Supreme Court (Ewing J.) of December 20, 1932, affirmed, on appeal, by an order of the Appellate Division of February 21, 1933, it has in effect now been found that the divorce trial did take place in open court, and the appellant's action, so far as it questions the sufficiency of that trial, has been dismissed.

The present is an appeal from these orders of dismissal. The appellant has, by special leave, been permitted to present and prosecute her appeal in forma pauperis. By it she challenges the finding in question. The trial, she contends, did not take place in open court, and once the finding that it did is displaced, it results, so she asserts, that the decrees following thereon being null and void, should now be so declared.

It may be stated here that the original issues in the appellant's action have now also been tried, and in the Court of first instance have resulted in a judgment adverse to her. But that judgment is the subject of a pending appeal to the Appellate Division, and their Lordships accordingly do not further refer to it. They confine their attention exclusively to the questions raised by the issue separately tried, and it will they think be convenient first to deal with the actual finding of the Courts below. Was the trial really held in open court, or was it not ? An important question, as will presently be seen.

The Judges' library at Edmonton in which the trial took place is not one of the regular Courts of the Court House there, and it is a circumstance on which reliance has been placed by the appellant that, at the time of the trial in that room and indeed throughout the afternoon of that day, one or more of these Courts was available. Up to a point, however, this fact is of little or no importance. There is at Edmonton no announcement with reference to a trial in a regular Court that would be withheld in the case of a trial in the Judges' library. There is there no daily cause list. No printed or written notice of the business in progress is apparently exhibited. Information on that subject is, it seems, obtained from the orderlies in attendance, and they, apparently, would know as much about a case appointed to be heard or being heard in the Judges' library as about one appointed to be heard or proceeding elsewhere. Had the learned judge on the occasion in question directed this divorce case to be taken in one of the empty Courts no greater degree of publicity would apparently, so far, have attended the proceedings.

In the matter of facilities for public access to the Court rooms on the one hand and to the Judges' library on the other there is, however, a very great difference to be noted: to the Court rooms direct public access is provided from a public corridor which encircles the entire second floor of the Court House. But there is no such direct access to the Judges' library. It is approached through a double swing door in the wall of the same corridor, immediately opposite the top of the stairway. One wing of the door is always fixed—the other, although swinging close, is usually unfastened. On the fixed wing is a brass plate with the word "Private" in black letters upon it. As to the unfastened swing door—the door to which alone when it is open the word "Private" has any sensible application—it opens on to an inner corridor in which, opposite, is a door of the Judges' library.

It was in evidence that the word "Private" on the outer door did not in fact deter or hinder entry to the inner corridor by practitioners and other familiars of the building, and the door unfastened is not usually officially guarded. It was accepted, too, that the opening wing of the swing door was unfastened during the trial, and it was proved, as will later appear, that the inner door of the library was kept open throughout. But there remains the serious question, to which their Lordships must return, whether these swing doors with "Private" marked upon one of them were not as effective a bar to the access to the library by an ordinary member of the public finding himself in the public corridor as would be a door actually locked.

On the day of the trial, Tweedie J. was not a judge in attendance at the Court House. For the convenience of one of the witnesses, who was coming from a distance, he had arranged to take the case himself on that day. It was only a few minutes before the hour appointed that he definitely selected the Judges' library as the place for the hearing, and he so informed the Clerk of the Court.

The proceedings took place during the luncheon interval, probably as the most convenient hour for all concerned. They were in one respect less formal than those of an ordinary trial in open court. The learned judge was not robed. Neither was counsel. In other respects the proceedings seem to have been quite regular. Tweedie J. entered the library from a door accessible only to judges. He was attended by an official shorthand writer and by the Assistant-Clerk of the Court—Mr. Mason. Before taking his seat at the head of the table in the library he stated that he was sitting in open court, a statement suggested, no doubt, by s. 5 of the Judicature Ordinance of the North-West Territories, later to be mentioned. He directed Mr. Mason to open and to keep open the door already mentioned leading from the library to the inner corridor. He evidently overlooked the swing door outside, with its appearance of being closed and its warning against public intrusion, for he gave no direction with regard to that door. Probably, the door being rarely closed, it was the legend upon it that he forgot. Had he recalled that word "Private," and appreciated its significance, then, judging by his action with reference to the inner door, he must either, it would seem, have had it plainly opened or he must have sat elsewhere.

In point of fact no member of the public entered the library while the trial proceeded. Only the learned judge and counsel, the respondent with his two witnesses, called in one after the other, and the Court officials already mentioned were there.

Having now closed their account of the proceedings, their Lordships pause, to join with everyone concerned, in affirming their own belief in the complete bona fides of the learned judge in everything he did on this occasion. He stated to Ewing J., the trial judge of this separate issue, that it was his desire to restrict publicity, but not in any way out of regard for the feelings or in deference to the position of the respondent personally. The suggestion that the procedure adopted on this occasion is traceable to the fact that the respondent was a Minister of the Crown is one easily made and readily accepted by credulous minds. It is right, therefore, that being unfounded, it should be definitely repelled. Their Lordships unreservedly accept the statement of the learned judge on this subject. For the rest, they believe that it was unhealthy notoriety rather than normal publicity that he really desired to restrict. It could hardly have been anything else. The respondent, after all, was plaintiff and not defendant in this undefended suit. He needed no protection, and in view of his position it is a satisfaction to place it upon record that learned counsel for the appellant disclaimed making any kind of reflection on the respondent in relation to any incident attending the trial. In that matter, at any rate, he is the victim of misfortune. Their Lordships, reading his evidence—the evidence, they assume, of a layman—are very ready to conclude that to him there appeared to be nothing in the proceedings of that day in any way out of the normal.

Now, the learned judges in Alberta, applying to the case the principles enunciated in *Scott* v. *Scott* (1) as those by which they were bound have, as already stated, reached the conclusion—McGillivray J.A. with some hesitation—that the trial in the library, as just described, was a hearing in open court, and their Lordships are impressed by the weighty

(1) [1913] A. C. 417.

considerations that can be ranged in support of that view. The facts of this case, for example, have little correspondence with those in *Scott* v. *Scott* (1)—the authority constantly referred to in argument as the foundation for the appellant's claim. That suit was heard in camera by direct order of the Registrar, his justification being that he was thereby merely following well established and authentic practice. As a result the public were deliberately, as well as effectively, excluded from the Court. Here, on the other hand, there was no actual exclusion of the public, although there was no actual public attendance. No such exclusion was intended nor, possibly, even desired. The learned judge would probably have been gratified by the presence of a small audience. But, even although it emerges in the last analysis that their actual exclusion resulted only from that word "private" on the outer door, the learned judge on this occasion, albeit unconsciously, was, their Lordships think, denying his Court to the public in breach of their right to be present, a right thus expressed by Lord Halsbury in *Scott* v. *Scott* (2): "Every Court of justice is open to every subject of the King."

To this rule, there are, it need hardly be stated, certain strictly defined exceptions. Applications properly made in chambers, and infant cases, may be particularized. But publicity is the authentic hall-mark of judicial as distinct from administrative procedure, and it can be safely hazarded that the trial of a divorce suit, a suit not entertained by the old Ecclesiastical Courts at all, is not within any exception.

The actual presence of the public is never of course necessary. Where Courts are held in remote parts of the Province, as they frequently must be, there may be no members of the public available to attend. But even so, the Court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none.

And their Lordships, in reaching the conclusion that the public must be treated as having been excluded from the

(1) [1913] A. C. 417.

(2) Ibid. 440.

library on this occasion, have not been uninfluenced by the fact that the cause then being tried was an undefended divorce case. To no class of civil action is Lord Halsbury's statement more appropriate. In no class of case is the privilege more likely to be denied unless every tendency in a contrary direction, whenever manifested, is definitely checked.

So long as divorce, in contrast with marriage, is not permitted to be a matter of agreement between parties, the public at large—their Lordships are not now referring to the prurient minded among them who revel in the unsavoury details of many such cases—but the public at large are directly interested in them, affecting as they do, not only the status of the two individuals immediately concerned but, not remotely when taken in the mass, the entire social structure and the preservation of a wholesome family life throughout the community.

And their Lordships are not surprised to find disclosed in the record traces of a practice existing in Edmonton, one not in their experience confined to Alberta, which seems to regard too lightly the duty of hearing these suits in public and with all appropriate ceremony. The trial of undefended suits in the Judges' library, with its warning off notice, although perhaps infrequent, has been by no means unknown. Mrs. Mattern's suit, for instance, was heard there. Such suits seem to have been heard, on occasion, in a judge's private room and, very probably, because no public attendance was anticipated, it appears that in the present case the discarding of the robe of ceremony was regarded both by judge and counsel as a matter of course.

And there is, perhaps, no available way to correct these tendencies more effectively than to require that the trial of these cases shall always take place, and in the fullest sense, in open court. This requirement must be insisted upon because there is no class of case in which the desire of parties to avoid publicity is more widespread. There is no class of case in which in particular circumstances, it can be so clearly demonstrated even to a judge that privacy in that instance would be both harmless and merciful.

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Again, publicity goes far to prevent the trial of these actions, where one is superficially so much like another, from becoming stereotyped and standardized, so that the ability to dispose of them with a minimum expenditure of judicial time is even now, apparently, regarded in some quarters as the convincing test of judicial efficiency.

Moreover, the potential presence of the public almost necessarily invests the proceedings with some degree of formality. And formality is, perhaps, the only available substitute for the solemnity by which, ideally at all events, such proceedings, especially where the welfare of children is involved, should be characterized. That potential presence is at least some guarantee that there shall be a certain decorum of procedure. If at other public sittings of the Court it is the rule for both judge and counsel to be robed, it is pessimi exempli that for the trial of an undefended divorce case the gown of ceremony should be discarded.

These are some of the considerations which have led their Lordships to take a more serious view of the absence of the public from the trial of this divorce action than has obtained in the Courts below. Influenced by them, their Lordships have felt impelled to regard the inroad upon the rule of publicity made in this instance—unconscious though it was—as one not to be justified, and now that it has been disclosed, as one that must be condemned so that it shall not again be permitted.

It will be seen that in reaching this conclusion their Lordships, like the learned judges in Alberta, have dealt with the case as if the principles applicable were those enunciated in *Scott* v. *Scott*. (1) In taking that course they have not forgotten the elaborate and careful argument by which Mr. Woods, for the respondent, sought to establish that in view mainly of the section of the Ordinance already referred to and the Divorce Rules of the Supreme Court the rule of publicity in divorce suits was less rigid in Alberta than it is in England, maintaining, indeed, that in Alberta, for the trial of undefended divorce suits, no publicity was required. Their

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(1) [1913] A. C. 417.

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Lordships do not discuss this suggestion. They think that the answer to it made by Mr. Greene, in reply, was complete, and they leave it there, referring only to the decision of the Judicial Committee in *Board* v. *Board* (1) as the source of the law of Alberta on this subject.

But what is the result of the irregularity in procedure now disclosed? This question had not to be dealt with in the Courts below. It must now be disposed of by the Board. The appellant claims that the irregularity operates to render the supervening decrees null and void: she advances the position that inevitably, and with no power of rectification in any Provincial authority, judicial or otherwise, the change of status effected on the face of it by the decree absolute does not result: that to this decree absolute s. 57 of the Matrimonial Causes Act, 1857, has no application, and that any subsequent marriage of either party to it, not being entitled to the protection of that section, and contracted in the lifetime of the other, is bigamous and its offspring illegitimate: that this inescapable result ensues, whatever be the breach of the rule in its attendant circumstances—whether, at one end of the scale, it be a calculated and interested secrecy: or whether, at the other end of the scale—and as here—the result of mere forgetfulness—and finally, but separately, that a declaration to the effect stated can properly here be made in the absence, as respondent, of Mr. McPherson's second wife.

It is agreed, however, that there is no case to be found in the books justifying these propositions. And their Lordships are of opinion that neither on principle nor by authority can they be supported, that the decrees here in question were voidable only, and not void, and that the time for avoiding them has long gone by.

Their Lordships would observe, in passing, that they are not in this case dealing with a decree nisi pronounced after a travesty of judicial proceedings—a mere stage trial. The quality of a decree pronounced after such an idle ceremonial may be left to be dealt with when it is produced. Here their Lordships are dealing with a decree pronounced after a serious trial free from every other defect in procedure, and one entered and remaining on the Court files as regular in every respect. To say that such a decree is void would seem to be out of the question. If the law were so to treat it, the remedy would be far worse than the disease it was designed to cure. To say that it is voidable states a result which, their Lordships think, entirely meets the case.

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(1) [1919] A. C. 956.

And that that is the true result emerges from an authority which, although not direct, is, in their judgment, completely analogous—the case of *Dimes* v. *Proprietors of the Grand Junction Canal* (1), in which it was held that an order made by a Lord Chancellor who was personally interested in the result was, while voidable, not void. In that case the judges were consulted and their opinion was given by Parke B. It was to the effect that the Lord Chancellor, by reason of his interest, was disqualified from judging in the cause, but that his decree was not in consequence absolutely void. It was voidable only, and, challenged on appeal, it was set aside by the House of Lords.

Learned counsel for the appellant did not find it possible to distinguish *Dimes's* case (1) from the present case, except upon the ground that the objection there taken to the decree was one which, as it merely affected property, could have been waived by the appellant and was therefore voidable only: but that the decrees here involved questions of status in which the public was interested: that there could be no waiver of the public right and that accordingly the decrees here were void. But this presupposes that no intervention in due time on the part of the public is in such cases as the present possible, and that supposition is, their Lordships think, mistaken. In the present case it was open to the Attorney-General of the Province, or the King's Proctor on his behalf, had he in the public interest thought fit to move by way of appeal, or before time for appeal had expired to move the trial judge himself to discharge the impugned orders on the ground that the trial, from which both resulted, had not been held in open court. In other words, the public through the Attorney-General had the fullest right of intervention.

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(1) 3 H. L. C. 759.

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But any such intervention had to be made before time for appeal had expired, or before the rights of third parties had intervened. Just as a contract to take shares in a company induced by fraud, and being voidable only, may be set aside before winding-up commenced but not later, after the rights of the company's creditors have intervened—so here, the order absolute cannot be touched after the time for appeal therefrom has passed, and a new status has been acquired, or in this case, after the respondent, having remarried, is entitled, as is also his wife, to the protection afforded by s. 57 of the Matrimonial Causes Act, 1857. It follows in their Lordships' judgment that the appeal fails: the order absolute, although originally voidable, having become unassailable by the time the appellant's claim was made.

In these circumstances it is unnecessary for their Lordships to consider whether any declaration that the decree was void could in any case have been made in a proceeding to which the present Mrs. McPherson was no party. Nor is it necessary for them further to examine the case of *Scott* v. *Scott* (1) for the purpose of showing that the order there made was not regarded by any of the noble Lords concerned, nor by the Attorney-General, nor by either of the parties to the appeal, as affecting in any way the order absolute which had in fact been made, and at the instance of the appellant too, while her appeal to the House of Lords was pending. The decree absolute in *Scott* v. *Scott* (1), as their Lordships have ascertained, still stands on the files of the Court intact: and so stands along with many another previous decree in a nullity suit made after a hearing in camera. In fact the decree was in no way affected by the judgment of the House notwithstanding that in its opinion the order directing the proceedings at the trial to be held in camera was so completely beyond the powers of the Court that, although obtained at the instance of the appellant herself, it might be disobeyed by her with impunity.

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(1) [1913] A. C. 417.

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On the whole case, their Lordships are of opinion that this appeal should be dismissed. And they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondent: *Blake & Redden.*

[HOUSE OF LORDS.]

H. L. (E.)*
1935
July 24.

FLOWER . . . . APPELLANT;

AND

EBBW VALE STEEL, IRON AND COAL COMPANY, LIMITED . . . . RESPONDENTS.

Master and Servant—Accident to Servant—Dangerous machine insufficiently fenced—Action for breach of statutory duty—Contributory negligence—Disobedience to orders—Evidence—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10, *sub-s.* 1 (*c*).

Decision of the Court of Appeal [1934] 2 K. B. 132 reversed on the ground that the only contributory negligence relied on was disobedience to orders, and that the evidence at the trial was insufficient to prove that the alleged orders were ever given.

Consideration by Lord Wright of the circumstances in which contributory negligence may be pleaded as a defence to an action by a workman for personal injuries through a breach by his employers of their duty under s. 10, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901, to fence securely all dangerous parts of the machinery in their factory.

APPEAL from an order of the Court of Appeal. (1)

The action was for personal injury alleged to have been sustained by a workman through his employers' breach of their statutory duty under s. 10 of the Factory and Workshop Act, 1901 (2), in not securely fencing a machine for rolling metal sheets in their factory.

(1) [1934] 2 K. B. 132.

(2) Factory and Workshop Act, 1901, s. 10, sub-s. 1 (*c*): "All dangerous parts of the machinery [in a factory] . . . . must either be securely fenced, or be in such a position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced" . . . .

* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD WRIGHT, and LORD ALNESS.

In addition to various defences not material to this report, the employers pleaded that the alleged injury was caused solely by the workman's own negligence in attempting to clean the said machine at a wrong part, and omitting to take reasonable care to prevent his left hand from coming into contact with the rollers.

The employers were the owners and occupiers of a Sheet Mill and Galvanizing Factory at Ebbw Vale in the county of Monmouth. The workman was employed in rolling metal sheets in a flattening machine in their factory. He was twenty-seven years old, he had been for fourteen years in the factory, and had been working at the machine for eighteen months.

The machine consisted of seven steel rollers ranged one behind the other horizontally, and six rollers below the seven and in the same relative position. The seven upper rollers rotated towards an observer standing in front of the machine; the six lower rollers rotated in the opposite direction. The first of the upper rollers was slightly in advance of the first of the lower rollers; and so with the second upper and the second lower roller, and so on. That part of the machine where the upper and lower rollers come nearest to each other is called "the bite." The rollers rotate at the rate of ninety revolutions a minute.

The machine stood 3 ft. ½ in. and no more from the ground. A brass bar ran 6½ in. in front of the front upper roller at about the level of the centre of that roller and parallel to it. Above the rollers was a black bar, presumably of iron, part of the frame-work of the machine.

On February 27, 1933, the workman in the course of his duty was cleaning the machine. To enable this to be done the rollers are set in motion. The safe and simple way to clean them is to take one's stand at the back of the machine and apply emery-cloth or engineers' waste over the iron bar to the upper part of the rollers; for then all the seven rollers are revolving away from the operator. There was some evidence that he had been told to use this method, but it was of a vague and general kind. When the upper rollers have been cleaned, the lower ones are cleaned from beneath. On February 27 two men were cleaning at the back of the machine, while the plaintiff was cleaning at the front. To enable him " to get over the roll to clean the top of it tidy," to use his own expression, he held the iron bar with his right hand and inserted his left hand with a handful of waste under the brass bar and rubbed the waste along the first upper roller, applying pressure to obtain a more effective result. Then apparently the edge of the waste was caught between the first upper and lower rollers and his hand was drawn in between the rollers and so severely injured that his arm had to be amputated two inches above the wrist.

The case was heard at Monmouth Assizes before Lawrence J. without a jury. The learned judge held that the machine was dangerous and that it was not sufficiently fenced; but that the workman had acted in disobedience to his orders without any good reason for so acting, and that his disobedience was the proximate cause of the accident. Accordingly he gave judgment for the employers. At the request of the parties he assessed the damages suffered by the workman in case his judgment was reversed on appeal. The amount was assessed at 2500*l.*

The workman appealed to the Court of Appeal. That Court (Scrutton and Maugham L.JJ. and Talbot J.) affirmed the judgment of Lawrence J.

The workman appealed to this House.

Sir William Jowitt K.C. and *A. W. Cockburn* for the appellant. Lawrence J. in giving judgment said: " It is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence." No exception can be taken to that statement of the law. But then the learned judge goes on: " In this case however the plaintiff was disobeying orders without, so far as I am able to see, any good reason, and in doing so was disregarding the fence which . . . . would have protected him had he obeyed his instructions." In the view of the learned judge the head and front of the appellant's offending was disobedience to orders. But the evidence of any orders having been given is of the vaguest kind; consisting of such phrases as "according to instructions," without a word as to who gave them or that they were ever in fact given to the appellant. If better evidence than this existed surely it would have been adduced.

[Counsel also argued the question in what circumstances an employer can successfully plead contributory negligence of the workman to an action by the workman for injury caused through the employer's breach of a statutory obligation imposed by the Legislature for the safety of the workman: *Caswell* v. *Worth* (1); *Senior* v. *Ward* (2); *Groves* v. *Lord Wimborne* (3); and *Bourke* v. *Butterfield Lewis, Ld.* (4) But, the House being in the appellant's favour on the first point, their Lordships, except Lord Wright, forbore to express an opinion on the second question.]

Sir Leslie Scott K.C., *St. J. G. Micklethwait K.C.* and *A. A. Warren* for the respondents.

Sir William Jowitt K.C. replied.

The House took time for consideration.

1935. July 24. LORD ATKIN. My Lords, I have had the advantage of reading the opinion about to be expressed by my noble and learned friend Lord Wright, and in consequence can confine what I have to say to a few words. The case involved two points: was the workman guilty of contributory negligence?; was contributory negligence a defence to a claim based upon a breach of a statutory duty? Your Lordships came to the conclusion at the hearing that contributory negligence was not established: and the second point therefore was not argued. On the first point the learned judge propounded the legal question as being whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendants' breach of duty. He then proceeded

(1) (1856) 5 E. & B. 849.
(2) (1859) 1 E. & E. 385.
(3) [1898] 2 Q. B. 402.
(4) [1926] 38 C. L.R. 354.

to acquit the workman of any lack of care other than disobedience to orders. For the reasons given in my noble and learned friend's opinion I agree that disobedience to orders was not proved: and I am not prepared to differ from the learned trial judge that no other lack of ordinary care was established. In these circumstances the plaintiff's claim must succeed: and I prefer to express no opinion upon the further matter raised by my noble and learned friend as to the degree of care or rather of lack of care of the workman that must be established before the employer, if at all, can defend himself on a claim for breach of statutory duty. The cases he refers to, in particular the Australian case of *Bourke* v. *Butterfield Lewis, Ld.* (1), were not discussed by counsel in pursuance of your Lordships' ruling; and as in my opinion the question raised by them does not arise in the present case, it seems to me better to reserve its consideration for another occasion. In my opinion the appeal should be allowed, the order of the Court of Appeal and the judgment of July 14, 1933, should be set aside, and judgment should be entered for the plaintiff for 2500*l.* with costs. The appellant must have his costs here and in the Court of Appeal.

LORD THANKERTON. My Lords, I concur in the opinion expressed by the noble and learned Lord on the Woolsack.

With reference to the argument based on the concurrent findings of facts in the Courts below, I desire to add that, in my opinion, there is neither rule nor practice in your Lordships' House which gives to such concurrent findings any element of inviolability beyond the weight which naturally attaches to such unanimity of judicial opinion. In the Judicial Committee, on the other hand, there is a practice—not a rule—of not disturbing such concurrent findings of fact, except under special circumstances.

LORD WRIGHT. My Lords, the appellant was at the time of the accident a workman employed by the respondents. He was at the time engaged in cleaning a machine which was

(1) 38 C. L. R. 354.

dangerous and which, as is now admitted, was not sufficiently fenced so as to comply with s. 10 of the Factory and Workshop Act, 1901. His action was based on the well known doctrine that, when a workman is injured in consequence of the breach by an employer of his statutory duty under the Factory Act, he has at common law a right of action against his employer. The nature of that right was fully examined by this House in the case of the *Lochgelly Iron and Coal Co.* v. *M'Mullen* (1), where the question was whether the employer in a case of this character could properly be said to be guilty of personal negligence or wilful default within the meaning of these words in s. 29 of the Workmen's Compensation Act, 1925, so that the workman's claim at common law was not barred. This House held that he could, but also pointed out that though the matter might well be held to fall within these words in their context in that Act, and though the breach could properly be described as statutory negligence, the duty to comply with the requirements of the Factory Act was an absolute duty in the sense that it could not be delegated and also in the sense that proof of actual negligence was not necessary; it was only necessary for the workman to establish the breach of the statutory duty which in law constituted the cause of action. In that case the House did not need to consider, and did not consider, what defences, if any, were in such a case open to the employer as against the injured workman.

That question, however, falls to be considered in the present appeal. The trial judge and the Court of Appeal have held that the employer is entitled to succeed on a defence which may be compendiously described as that of contributory negligence. The appellant contends that the judgment against him should be set aside and judgment entered in his favour for the damages, which the judge has assessed in the event of the appellant succeeding at 2500*l.* The contention on behalf of the appellant is based on two alternative grounds, one of which is that the defence of contributory negligence is not open to an employer in this type of action; the alternative ground of appeal is that (even if the defence of contributory

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(1) [1934] A. C. 1.

Lord Wright.

negligence is open) the finding of the judge, on which his judgment was in fact based, and, on his view of the law, could only be based, was that the accident was caused by the appellant's disobedience of instructions, but that as there was no, or at least, no sufficient, evidence to justify that finding the appeal must succeed.

Your Lordships decided to deal first with this latter contention before proceeding to consider the more fundamental question of law raised by the former contention. As your Lordships are of opinion that the appellant is entitled to succeed on his latter contention, it has become unnecessary for your Lordships to hear any arguments on the more fundamental question, or to express any opinion about it, and hereinafter I shall assume, though the question is reserved for decision in this House if it should ever arise in the future, that contributory negligence, properly defined and properly established, is a defence in this action. But it must be determined what is the proper definition in this connection of contributory negligence and if it has been properly established.

I must first explain what I understand the judge to have actually decided, and also the principles of law on which in my opinion he proceeded. Apart from the crucial question whether the appellant disobeyed instructions given to him, the relevant facts as found by the judge are not in doubt.

The machine was one for the rolling or levelling of metal sheets. The precise technical details need not now be detailed with any particularity. It is enough to describe the machine as one in which there were two rows, an upper and a lower, of steel rollers revolving at about 90 revolutions a minute, the metal sheet being introduced at the front between the two rows. The upper row was at a height of about 3 ft. from the ground. The top row would obviously involve danger if a hand or finger were caught between the first and second roller, the contrary motions of which at what was called the bite would draw in the finger or arm and crush it; the same would be true of the bottom row at the bottom. With the object of obviating the danger, a copper bar had been fixed to meet the complaint of the Factory Inspector as a fence in front of the rollers; previously there had only been a black metal bar connecting the tops of the two sides of the frame of the machine. The Factory Inspector was not satisfied with this fence, which was fixed early in 1932; but no further fence had been fixed when the accident occurred in February, 1933.

The appellant was injured when cleaning the machine, which for the purpose of being cleaned had to be in motion. He had then been fourteen years in the respondents' employment and had worked on the machine since its installation in November or December, 1931, that is some time before the copper bar was installed. His evidence was that he had always cleaned the machine in the manner in which he was working at the time of the accident. The judge accepted the appellant's account, which was that "he had been holding the black bar at the top of the machine with his right hand, and that in order partly to see better and partly to exert more pressure on the roller, he had put his left hand up under the copper bar with the palm against the first top roller, and that then somehow his hand was drawn into the bite."

It was objected that there could have been no damage if the appellant had been cleaning the roller from the top and over the black bar. But the respondents' main case at the trial was that the men, including the appellant, had been expressly instructed only to clean the rollers from the top. That point was not raised on the pleadings but was gone into at the trial. As already stated, the judge found that the machine was not sufficiently fenced and was dangerous and was maintained in breach of s. 10 of the Act; indeed it is obvious that a more adequate fence would have made it impossible for the appellant to put his hand in, when cleaning the machine, under the copper bar. The conclusions and findings of the judge are, I think, sufficiently expressed in the two following extracts from his judgment. The judge, having held that the defence of contributory negligence was open to the respondents, then proceeded: "The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendant's breach of duty. I find that he could and that the proximate cause of the accident was his own disobedience of orders in putting his hand and arm under the copper bar in such a way as to make the fence, which had been provided, utterly useless." Again, at the end of his judgment, he thus sums up his conclusion: "I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence. In this case, however, the plaintiff was disobeying orders without, so far as I am able to see, any good reason, and in doing so, was disregarding the fence which, though, as I hold, not a secure fence within the statute, had been put there for his protection and would have protected him had he obeyed his instructions."

In my opinion, the judge was carefully distinguishing between what may not very precisely be called an error of judgment of the workman and something which he describes as contributory negligence. To constitute the latter, the judge was directing himself that he must find some such fact as he here finds—namely, that "the proximate cause of the accident was his own disobedience to orders without any good reason." It is only the latter as I understand his judgment that he was prepared in law to hold to be contributory negligence.

This reasoning seems to me to agree with that in the earliest case in England on this matter, still, I think, the leading case, *Caswell* v. *Worth* (1), which was decided on demurrer. Lord Campbell C.J., after stating that the employer had failed to fence the machinery as required by the Factory Act, said that the plea alleged that the plaintiff, while the driving shaft was not in motion, wilfully and against the will and contrary to the express commands of the defendants set it in motion, well knowing that it was dangerous and contrary to the express command of the defendants, whereby and not by the negligence of the defendants he was injured. Lord Campbell goes on to

(1) 5 E. & B. 849, 855, 856.

say: " here there was not only a want of ordinary care, but a knowing and wilful incurring of the risk by the plaintiff." Wightman J. said: " the plea alleges that the plaintiff was not injured thereby (sc., by the defendants' failure to fence), but by the plaintiff's own wilful act in setting the machinery in motion." Crompton J. agreed. It is true that Coleridge J. seems to treat ordinary negligence (an obscure term) and misconduct as synonymous, but he is in that respect alone of the judges in the case. In *Senior* v. *Ward* (1) the act which was held to bar the claim involved a wilful and reckless disregard of orders and warnings. I do not find in the later authorities any explicit departure from Lord Campbell's ruling, which I think the judge was right in following and applying as he did in terms. It is true that in *Britton* v. *Great Western Cotton Co.* (2), and in the well known dictum of Vaughan Williams L.J. in *Groves* v. *Lord Wimborne* (3), and in subsequent cases, the defence has been described as the defence of contributory negligence, but that still leaves for definition what in this context is the ambit of that defence. I think it cannot have been intended in any of these cases to ignore the views of Lord Campbell, whose judgment has been constantly cited and relied upon, or (to quote the trial judge's words as to what conduct would amount to contributory negligence in the present case) " to assume that the doctrine demands of a workman in the factory a higher degree of care than an ordinary prudent workman in a factory would show," in the sense in which I think the judge used these words.

I need not further discuss the authorities, save that I should like to refer to a case in the Australian High Court to which the judge draws attention. It is reported as *Bourke* v. *Butterfield Lewis, Ld.* (4) The judge points out that in that case the defence of contributory negligence was said to be incompetent in these actions and he observes that this statement is contrary to the current of authority in England, at least up to the present. I do not desire to criticize or examine that decision, because it was not argued before this House, but I cannot forbear to point out that possibly in substance the Australian High Court was acting on the same principles as Lawrence J. in this case. Let me quote a short passage from the leading judgment, which was that of Knox C.J., Gavan Duffy and Starke JJ. (1): "In our opinion it would be unreasonable to attribute to Parliament an intention to impose upon the employer responsibility for an injury which the employee deliberately invites, whether by adopting the means of inflicting it, or by rejecting the means of avoiding it, or for an injury which has happened because the employee deliberately took an unnecessary risk not in the interests of the employer, but for his own purposes. It is not easy to frame an exact formula: but it may be said that the employer is responsible for the negligence, but not for the misconduct, of his employee. Whether the conduct of an employee goes beyond mere thoughtlessness or want of care and amounts to misconduct is in every case a question of fact." This quotation seems to embody a rule, little, if at all, different from what Lawrence J. adopted.

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(1) 1 E. & E. 385.
(2) (1872) L. R. 7 Ex. 130.
(3) [1898] 2 Q. B. 402, 419.
(4) 38 C. L. R. 354.

It is accordingly necessary to examine what evidence there was to justify the finding of "disobedience to orders," which I agree with Talbot J. in the Court of Appeal in regarding "as essential to the conclusion that this man had been guilty of contributory negligence." I only note the fact that disobedience to orders was not mentioned in the defence, to observe that if there had been such orders to the appellant in any effective sense I should have expected that point to be put in the forefront of the defence. Still, if the evidence at the trial had been sufficient and convincing, I should not have laid stress on the pleading having regard to what happened at the trial. I turn to the actual evidence. Before I examine that in detail I must observe that the onus to establish the respondents' case on this head is on the respondents, and that as their case seeks to ascribe to the appellant a gross breach of orders "without any good reason" that case must be properly proved; it thus becomes the more remarkable that it was never put to the appellant, when he gave evidence, that

(1) 38 C. L. R. 360.

instructions had been given to him not to put his hand under the copper bar, and that he had disobeyed them.

As this matter is so critical, I shall cite all the passages dealing with this point, in the evidence called by the respondents. I cite from the shorthand notes, which I have compared with the full and careful judge's note, and I find both notes in substantial agreement.

Of the witnesses called on behalf of the respondents, three give evidence in regard to this matter. Of these the first was Stanley Lewis, the shift foreman, who ought to have known definitely if there had been any specific instructions given to the appellant, or indeed to any one. He was asked in examination-in-chief: "When you clean this machine, how do you do it?" He answered: "The instructions for cleaning are that we clean the top of the rolls with a cross motion, and the under rolls underneath." The next question was simply as follows: "Is there any need or reason to clean under the copper bar?" Answer: "Not at all." In cross-examination he was asked whether that thing (i.e., the front roll) was not the more dangerous? He replied: "No, not if instructions are carried out about keeping to the top of the rolls."

Then later the judge put this question: "You say instructions were to clean the top of the roller?"

A. "Yes."

Q. "Does that mean to clean over the top of the black bar?"

A. "The instructions are to clean over the top of the roll, and the natural thing is over the top of the black bar."

The witness who, as shift foreman, was in direct charge of the machine, was in these answers clearly, as I think, limiting the instructions simply to cleaning the top of the roll. By inference he was negativing any instructions as to cleaning over the top of the black bar or any instructions forbidding the men from cleaning, as the appellant was doing, by putting the hand under the copper bar. Nor is it said that any instructions of any kind were given to the appellant himself, or when or in what form any instructions were given to anybody; from all that appears, there may have been some instructions, whatever they were, given before the copper bar was fixed, which was some months after the machine was in use and therefore could not have been relevant to what was to be done after the copper bar was fixed.

The next witness called by the respondent was the general foreman, Ford; he was asked in chief: "Did you give any instructions to the men?"

A. "For the machine to be cleaned?"

Q. "What is the method? How is it done?"

A. "To clean . . . . the top rolls are cleaned from the top and the bottom rolls from underneath."

Q. "Is there any reason whatever for a man to put his hand up below the copper pipe?"

A. "None at all."

Q. "Have you ever seen either Flower or any of the others doing it?"

A. "I have never seen any one doing that."

So this evidence is very far from speaking to the suggested instructions. At the end of his examination he was again asked—

Q. "As I understand it, you have never seen a man do that before" (i.e., putting his hand up underneath the thing to clean it)?

A. "Never before."

Q. "It was contrary to instructions?"

A. "Yes."

So that at last a leading question is answered in the affirmative. Then, having gone so far in chief, he is later in the course of the cross-examination asked by the judge this question: "If you are cleaning the top of the roll between the copper and the black bar, the copper bar acts as a guard?" (A.) "It is against instructions to clean under that." Then appellant's counsel asks: "To clean under the copper bar?" (A.) "Yes, to clean under the copper bar." There the matter is left with this witness. It is clear the onus was on the respondents to establish instructions not to clean the top of the rolls by putting the hand up under the copper bar, and to establish that these instructions were brought home to the appellant. The evidence of this witness, at first only elicited by a leading question, is to my mind most vague and unsatisfactory; it was for the respondents to prove this most crucial part of their case, and so far the evidence seems to me to be most shadowy and unconvincing, and in any case not to be evidence that any instructions were given to the appellant.

Then we come to the evidence of a workman called Thomas Edwards. In chief that witness was asked no question about instructions; he said he always cleaned the machine from the top, but in cross-examination he was asked—

Q. "Were any definite instructions given you as to how you were to clean it?"

A. "General instructions to clean it from the top, putting our hands on the top either with sand-paper or waste."

Why the appellant's counsel asked this question I do not know; it may have been because he had been led to think that the answer would have been in the negative. But however that may be, it seems to me that he was well advised to drop the matter; the onus being on the respondents, it was, I think, for them, if they wanted to establish that specific instructions had been given to the appellant not to put his hands under the copper bar when he was cleaning the top, to establish that affirmatively. Whether they have done so must be decided on the actual state of the evidence, quite irrespective of whether the appellant's counsel might have pressed the matter further if he had thought fit to do so. It was not for him to disprove the respondents' case. The matter must be decided on the evidence as it is left. The appellant was being charged with gross misconduct in disobeying instructions and would have been guilty of gross misconduct if he had in fact disobeyed them. Even if I put aside the silence of the defence on this point and the absence of cross-examination of the appellant, to whom at the least the matter should have been put with the utmost precision, I find the evidence of the respondents' witnesses, either taken separately or in its totality, most unsatisfactory. It is not thus that a matter of this kind should be proved and, as my experience goes, would have been proved if it could have been. With great respect to the judge and the two Lords Justices who were fully convinced and to Talbot J., who had serious doubts, there was in my judgment either no evidence or certainly no sufficient evidence to justify a finding that such instructions had ever been given to the appellant. I find it impossible to hold him guilty of the disobedience with which he is charged.

That being so, the foundation on which the judge bases his decision fails, and if that fails the appeal, in my opinion, for reasons explained above, must succeed.

I shall add two observations. It was said that your Lordships should not differ from a finding of fact by the trial judge, and reliance was placed on a recent decision of this House in the case of *Powell* v. *Streatham Manor Nursing Home.* (1) But as was pointed out in that case, every appeal from a judge trying a case without a jury is a retrial, so that the appellate Court is bound to exercise a judgment of its own because the appellate Court is in its turn a judge of fact. What was pointed out in that case was that where the personality of the witnesses was an essential element in the decision, there being a conflict of evidence of fact, an appellate Court ought not save in the clearest cases to set aside the decision of the trial judge who has seen and heard the witnesses. But in the present case it is not really a question of the credibility of the witnesses but a question of the sufficiency of their evidence to establish what the respondents had to prove. The evidence, if fully believed, may still be inadequate to prove the case.

It is further objected that there are here concurrent findings of fact. That would not be a relevant consideration if the case were one in which there was no evidence at all that any such specific instructions as were relied on were brought home to the appellant's mind. I do not feel it necessary to say whether I am so satisfied, but I am quite clear that there is

(1) [1935] A. C. 243.

no sufficient evidence. I do not think that in any event this is a case in which the fact of concurrent findings below should prevent your Lordships from setting aside the finding, if satisfied that it should not have been made. There is no rule binding this House not to interfere with concurrent findings of fact. This House will always in proper cases reconsider the evidence notwithstanding that there are concurrent findings of fact, and this is a case in my opinion in which reconsideration is justified.

In the result, in my opinion the appeal should be allowed, the judgment below should be set aside, and the appellant have judgment entered for him for 2500*l*. with costs here and below.

LORD ALNESS. My Lords, the plaintiff's claim in this case is deemed to have failed because of his contributory negligence. Now the onus is manifestly upon the respondents to establish that defence beyond all reasonable doubt. Have they done so? That is the question. The only contributory negligence attributed to the plaintiff is that he disobeyed instructions given to him—in other words, that he did what he was forbidden to do. Where, then, is the evidence of the prohibition, express or implied, disobedience to which deprived the plaintiff of the compensation to which he would otherwise be entitled? When I ask, as I do, and as I am entitled to do, who issued the instructions which are said to have been disobeyed, what they were, when and how they were promulgated, and to whom they were communicated, I can find, in the evidence, no satisfactory answer to any one of these questions. The verdict on that issue, in which the burden of proof is on the respondents, must accordingly be, if I may borrow from Scottish legal nomenclature, one of "not proven." The basis therefore upon which the plaintiff's claim has been held to be defeated having disappeared, his claim remains intact, and must succeed. I agree in the motion which has been moved.

LORD ATKIN. My Lords, I am asked by my noble and

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learned friend Lord Tomlin to say that he concurs in the opinion which I have delivered.

Order appealed from and judgment of the King's Bench Division of July 14, 1933, *set aside: Ordered that judgment be entered for the appellant for* 2500*l. with costs: Further ordered that the Respondents do pay the Appellant his costs in the Court of Appeal and in this House.*

Lords' Journals, July 24, 1935.

Solicitors for appellant: *Pattinson & Brewer, for Lyndon Moore & Co., Newport (Mon.).*

Solicitors for respondents: *Bell, Brodrick & Gray, for Arthur J. Prosser, Cardiff.*

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Jan. 27.

[HOUSE OF LORDS.]

HUNTER . . . . APPELLANT;

AND

HUNTER AND OTHERS . . . . RESPONDENTS.

ET E CONTRA.

Private company—Restrictions in Articles on transfer of shares—Deposit of share certificates as security for overdraft—Demand by Bank for payment—Sale by Bank notwithstanding restrictions—Right to redeem—Estoppel—Sale ineffective to transfer equitable interest.

S. H., the holder of shares in a private company, T. H., Ld., was also chairman of a company, C. & Co., Ld. The account of C. & Co. with their bankers being largely overdrawn, S. H. gave the bankers a continuing guarantee and deposited with them a certificate for 800 shares in T. H., Ld., with a memorandum charging all shares, the certificates for which were or might be lodged with the bankers, as security for the payment on demand of all moneys due or to become due to them, and, upon default

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* *Present:* VISCOUNT HAILSHAM L.C., LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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by him in paying or further securing on demand any money secured, authorizing them without further notice to sell the shares.

By the articles of association of T. H., Ld., a member could not transfer his shares until he had given notice to the secretary offering to sell the shares at a price to be fixed by the auditor, and until the secretary had offered them to the other members, one director, T. H. V. H., having a right of pre-emption.

The bankers began to press for a transfer of the shares into the names of two nominees. They were aware of the articles of association of T. H., Ld., and were warned by S. H. that such a transfer would be invalid. They also gave S. H. notice in writing demanding payment of C. & Co.'s overdraft. S. H. then gave them as further security certificates for 346 additional shares in T. H., Ld., and executed instruments purporting to be transfers of 1146 shares in that company, and the nominees of the bankers were placed on the register of the company as the holders of the shares.

In order to obtain a further advance for the benefit of C. & Co., S. H. executed a mortgage of other property, covenanting to pay the bankers on demand all money then or at any time due from himself or from C. & Co. Application was then made to the auditor of T. H., Ld., to fix a price for the 1146 shares: a price was fixed, and the shares were bought by T. H. V. H. with money borrowed from the bankers and secured by a so-called transfer of the 1146 shares and 850 other shares to nominees of the bankers, who were placed on the register of T. H., Ld., as the holders of 1996 shares.

Two actions were brought, one by E. H., a shareholder in T. H., Ld., suing on behalf of herself and all other the shareholders in the company, except T. H. V. H., and claiming to have the register of shareholders rectified by restoring thereto the name of S. H. as the holder of 1146 shares and entering that of T. H. V. H. as the holder of 850 shares on the ground that all the transfers and registrations aforesaid were made in contravention of the Company's articles and were void. The second action was brought by S. H., who sought the same relief and also claimed the right to redeem the 1146 shares on the footing that the sale of the shares was void, and that his equity of redemption was still subsisting.

In E. H.'s action, which was the first to be tried, an order was made for rectification of the register as prayed therein. In S. H.'s action a similar order was made, and a further order that S. H. was entitled to redeem the 1146 shares. T. H. V. H., T. H., Ld., and the bankers and their nominees appealed against the orders in both actions. The Court of Appeal dismissed the appeal in E. H.'s action. From that decision there was no appeal. The Court of Appeal allowed the appeal in S. H.'s action, holding that S. H. was entitled to be upon the register, but that the sale of the 1146 shares to T. H. V. H. operated as a valid transfer of the equitable interest in the shares, and ordering that S. H. should execute a declaration of trust of the shares in favour of

T. H. V. H. and the bankers or as they should direct. From this decision S. H. appealed, and there was a cross-appeal by T. H. V. H., T. H., Ld., the bankers and their nominees :—

Held, that the appellant was entitled to have the register rectified by restoring his name thereto as the holder of 1146 shares, on the grounds :—

(1.) Per the Lord Chancellor, Lord Blanesburgh, Lord Russell of Killowen, and Lord Macmillan, Lord Atkin doubting, that there was no effective demand for payment before the attempted sale of the shares, the demand which was made having been superseded by the security and the mortgage subsequently given and executed ;

(2.) Per the Lord Chancellor, Lord Atkin, and Lord Macmillan, that there was no effective sale of the shares, the restrictions imposed by the articles of association of the Company not having been observed ;

(3.) Per the Lord Chancellor and Lord Macmillan, that the appellant was not estopped from claiming rectification of the register, inasmuch as the bankers were well aware, and had been informed by the appellant, of all the restrictions upon the sale of the shares (Lord Blanesburgh assenting on other grounds) ;

(4.) Per the Lord Chancellor, Lord Blanesburgh, Lord Atkin, Lord Russell of Killowen, and Lord Macmillan, that the attempted sale by the bankers did not operate to pass the equitable apart from the legal interest in the shares.

Decision of the Court of Appeal upon this point reversed.

APPEAL from an order of the Court of Appeal.

The facts, which are stated in detail in the judgment of the Lord Chancellor, were, more shortly, as follows :—

In December, 1927, Samuel Arthur Hunter, the plaintiff in the action and the present appellant, was the registered holder of 1146 shares of 10*l*. each in a private company known as "Thomas Hunter, Ld." He was also chairman of the defendants A. M. Cawthra & Co., Ld. And he was a customer of the defendants, Lloyds Bank.

In December, 1927, he applied to Lloyds Bank in order to obtain an advance for A. M. Cawthra & Co. On December 19 the Bank agreed to make an advance to A. M. Cawthra & Co. upon being secured by a continuing guarantee by the plaintiff of the debt of A. M. Cawthra & Co. up to a principal sum of 10,000*l*., with interest thereon at 5 per cent. from a date six months before demand by the Bank upon the plaintiff as guarantor, and by a deposit by the plaintiff of a certificate for 800 10*l*. shares in Thomas Hunter, Ld.

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On December 19, 1927, the plaintiff signed a continuing guarantee to the Bank, and also a memorandum of charge whereby he charged in favour of the Bank all shares the certificates for which were then or might thereafter be lodged with or held by the Bank, as security for the payment on demand of all moneys then due or to become due from him to the Bank. The memorandum contained the following clause :—

"2. If I make default in paying, further securing, or satisfying to you on demand any money or liability hereby secured, you may without further notice sell or dispose of any securities subject hereto or any part thereof or any substituted securities in such manner and for such consideration (whether payable or deliverable immediately or by instalments) as you may think fit, and you may apply the proceeds of sale in or towards the discharge of the costs incurred therein and of the money or the liabilities hereby secured, and the residue to be paid to me or my order."

On December 19, 1927, or early in January, 1928, the plaintiff deposited with the Bank his certificate for 800 shares in Thomas Hunter, Ld. Subsequently the Bank made further advances to A. M. Cawthra & Co., and to secure these the plaintiff signed three additional guarantees dated respectively August 24, 1928, February 20, 1929, and January 28, 1930. The total sum guaranteed was 28,000*l*.

Thomas Hunter, Ld., was a private company. The articles of association contained restrictions upon the transfer of shares in the Company. By article 17 : "No member shall be entitled to transfer any shares otherwise than in accordance with the following provisions : (*a*) A member desirous of selling his shares (hereinafter called 'the selling member') shall give a notice (hereinafter called 'the notice of sale') to the secretary of the Company containing an offer to sell the same, and stating the number of the shares which he desires to sell and the price which he is willing to accept for such shares, which price shall be a price to be fixed and certified by the auditors or auditor of the Company for the time being, and which price when so fixed shall be deemed to be the fair price and final and binding."

The articles contained further provisions to the effect that the secretary of the Company should give to the other members of the Company notice of the offer for sale and of the fair price; and also a provision giving the defendant Thomas Henry Victor Hunter, one of the directors of the Company, and hereafter called T. H. V. Hunter, a right of pre-emption of any shares offered for sale, so long as he should be a member of the Company and the holder of not less than 1000 shares therein and the managing director thereof. By article 17 (*d*) if within a month from the date of service of the notice of sale the offer of sale should not be accepted by some member of the Company, the selling member was empowered to sell the shares to any other person at a price not less than the fair price as thereinbefore provided.

In June, 1930, Lloyds Bank were anxious to have a transfer of the 800 shares executed in favour of their nominees, one F. H. Ragg, the manager, and one Joseph Lyford, the assistant manager, of the Leicester Branch of the Bank.

The Bank were well aware of the contents and effect of article 17 of the articles of association of Thomas Hunter, Ld., and it was clearly pointed out to them by the plaintiff that any such transfer as they desired was forbidden by the articles and would be invalid.

In October, 1930, the Bank began to press A. M. Cawthra & Co. to reduce the amount of their indebtedness. On October 9 they gave the plaintiff formal notice in writing demanding payment of the aforesaid sum of 28,000*l*. Negotiations then took place between the plaintiff's solicitor, Mr. Pickup, and Mr. E. A. Raybould, the Principal Controller of the District Office of the Bank at Birmingham, the result of which was that on November 10 the plaintiff deposited with the Bank certificates for 346 additional shares of 10*l*. each in Thomas Hunter, Ld., and on November 12 he executed three transfers in blank of these shares and of the 800 shares the certificates of which he had already deposited as aforesaid. At the instance of the Bank these transfers were executed by F. H. Ragg and Joseph Lyford as transferees. The transfers and certificates for the shares to which they related were sent to Thomas Hunter, Ld., on November 17, 1930, and on December 22, 1930, the names of F. H. Ragg and Joseph Lyford were placed on the share register of Thomas Hunter, Ld., as the holders of 1146 shares and a certificate under the seal of the Company in the names of Ragg and Lyford was issued to the Bank.

In February, 1931, the plaintiff asked the Bank to allow a further overdraft on the account of A. M. Cawthra & Co. and agreed to give further security by means of a mortgage on his reversionary interest under the trusts of the will of Thomas Hunter; and by a mortgage dated April 15, 1931, reciting that he had guaranteed the account of A. M. Cawthra & Co. with the Bank, whereby he might become indebted to the Bank in certain moneys, he covenanted with the Bank to pay them on demand all money and liabilities which then were or at any time might be due owing or incurred from or by A. M. Cawthra & Co. or himself to the Bank, and it was agreed that the sum secured should be deemed to have become due immediately on demand for payment being made by the Bank; and it was provided that nothing in the mortgage deed contained should operate to merge any security which the Bank might have or any right or remedy thereunder.

On October 22, 1931, the Bank, after making renewed application to A. M. Cawthra & Co. to reduce their overdraft, wrote to the plaintiff desiring him to realize his shares in Thomas Hunter, Ld., explaining that they did not wish to deal with the securities themselves, as the plaintiff would be able to obtain better prices for them than they themselves could realize.

Getting no reply to this letter they wrote again to say they proposed to take measures themselves.

Earlier in 1931 F. H. Ragg had died, leaving the defendant Joseph Lyford the survivor of the two nominees of the Bank and joint holders of the 1146 shares in Thomas Hunter, Ld. In November, 1931, the auditors of that Company were Messrs.

A. E. Sherrey Garland & Co. In order to ascertain a fair price of the shares the defendant Lyford wrote to this firm saying that he was the surviving holder of the 1146 shares, and was minded to offer them for sale, but understood that he must first ascertain the price at which they were to be offered and that the price was to be fixed by their firm, and adding: "Will you be good enough, therefore, to fix the price, and advise me, after which I will consider whether I will formally offer the shares to the Secretary of the Company, in accordance with the articles."

Mr. Garland of that firm fixed 13*l*. 6*s*. 8*d*. per share as the fair price, and his firm notified the defendant Lyford of that appraisement on November 17, 1931.

On November 18 the defendant Lyford served on the secretary of Thomas Hunter, Ld., the following notice: "I, Joseph Lyford, of Lloyds Bank, Ld., Leicester, the surviving holder on a joint account of Frank Hugh Ragg (deceased) and myself, the proprietor of 1146 10*l*. ordinary shares of and in Thomas Hunter, Ld., do hereby give you notice that I offer and desire to sell the same at the price of 13*l*. 6*s*. 8*d*. per one 10*l*. share, such price being fixed and certified by the auditors of the Company. This notice is given in accordance with the provisions of the articles of association of the Company." On the same day the defendant T. H. V. Hunter, purporting to exercise his right of pre-emption under the Company's articles of association, offered to buy the shares at the price mentioned. On December 19, 1931, the secretary of the Company declared that a contract had been entered into whereby the defendant T. H. V. Hunter bought the 1146 shares. On April 4, 1932, the defendant Lyford transferred these shares to the defendant T. H. V. Hunter in consideration of 15,280*l*.

In order to pay that sum the defendant T. H. V. Hunter borrowed the money from Lloyds Bank and purported to transfer the 1146 shares together with 850 of his own in Thomas Hunter, Ld., to the defendants Smith and Lindop as nominees of the Bank, and on April 8, 1932, the defendants Smith and Lindop were registered in the share register of Thomas Hunter, Ld., as the holders of 1996 10*l*. shares in that Company.

On August 17, 1932, two actions were commenced in the Chancery Division of the High Court, one (*Hunter* v. *Hunter and Others*, 1932 H. No. 3184) by Mrs. Emily Hunter, a shareholder in the Company, suing on behalf of herself and all other the shareholders of the Company except the defendant T. H. V. Hunter. The second action, which was brought by the plaintiff Samuel Arthur Hunter (*Hunter* v. *Hunter and Others*, 1932 H. No. 3188), was the action out of which the present appeal arises. In the first-named action Mrs. Emily Hunter claimed to have the register of Thomas Hunter, Ld., rectified by restoring thereto the name of Samuel Arthur Hunter, the plaintiff in the second action, as the holder of the said 1146 shares and the name of T. H. V. Hunter as the holder of the said 850 shares, on the ground that all the said transfers and registrations above referred to had been made in contravention of No. 17 of the Company's articles of association, and were void. The two actions came on for trial before Bennett J. in January, 1934, and were tried by the learned judge consecutively. In the action in which Mrs. Emily Hunter was plaintiff judgment was on January 26, 1934, entered in her favour, and it was ordered that the register of members of Thomas Hunter, Ld., should be rectified by striking out the names of the defendants Smith and Lindop as holders of the said 1146 and 850 shares and inserting in lieu thereof the names of Samuel Arthur Hunter and T. H. V. Hunter as holders of 1146 and 850 shares respectively.

In the action in which Samuel Arthur Hunter himself was the plaintiff (being the action out of which the present appeal arises) the plaintiff claimed, and on February 23, 1934, it was declared, that his right to redeem the 1146 shares in Thomas Hunter, Ld., was still subsisting notwithstanding the de facto transfers and registrations above-mentioned, and that the register of Thomas Hunter, Ld., should be rectified by striking out the names of the defendants Lindop and Smith as shareholders of 1146 ordinary shares and inserting in lieu of those names the name of the plaintiff as the holder of those shares.

Lloyds Bank, the defendant Joseph Lyford as the survivor of the de facto transferors, and the defendants Lindop and

Smith as the de facto transferees, of the 1146 shares, appealed. The Court of Appeal (Lord Hanworth M.R. and Romer and Maugham L.JJ.) affirmed the order of Bennett J. in so far as it declared that the register of Thomas Hunter, Ld., should be rectified and that the name of the plaintiff Samuel Arthur Hunter should be substituted as the holder of the 1146 shares; but the Court held that the sale to the defendant T. H. V. Hunter operated as a valid sale of the equitable interest in those shares, and consequently that the plaintiff Samuel Arthur Hunter was not entitled to redeem them, but that upon being restored to the register of shareholders he would hold the shares as trustee for the defendant T. H. V. Hunter. The Court accordingly ordered that the plaintiff on being restored to the register should execute a declaration of trust in favour of T. H. V. Hunter and the Bank, or as they should direct.

The plaintiff S. A. Hunter appealed. There was a cross-appeal by T. H. V. Hunter, Lloyds Bank, Ld., J. Lyford, Thomas Hunter, Ld., C. H. Lindop and W. R. Smith.

1935. Oct. 15. *Sir Gerald Hurst K.C.* and *R. H. Hodge* for the appellant. The Court of Appeal was right in ordering that the register of Thomas Hunter, Ld., should be rectified by restoring thereto the name of the appellant as the holder of 1146 10*l.* shares in the Company. The so-called transfer by the appellant to Ragg and Lyford, the nominees of Lloyds Bank, was, as he told the Bank and as they knew it would be, a mere nullity; and Ragg and Lyford ought never to have been placed on the register of the Company. Not being rightly on the register they never were members, nor was Lyford, the survivor of them, ever a member of the Company, and neither could sell the shares to T. H. V. Hunter or to any one else. Any such attempted sale was forbidden by No. 17 of the articles of association. In addition to these reasons, the order of the Court of Appeal dismissing the appeal in Mrs. Emily Hunter's action and restoring the name of the appellant to the register has the effect of a judgment in rem and, at any rate, binds the parties to this appeal.

But the Court of Appeal was wrong in ordering that the appellant when restored to the register should execute a declaration of trust in favour of T. H. V. Hunter or the Bank. That order could only be made on the footing that the Bank through their nominees, though unable to dispose of the legal interest, could pass the equitable interest in the shares. But, first, article 17 in placing restrictions on a sale of the shares must be taken to restrict a sale of the equitable as well as of the legal interest in the shares; otherwise it would be practically ineffective. Secondly, the Bank were only equitable mortgagees; but whether they acquired the right to sell at law from the memorandum of December 19, 1927, or in equity, that right did not arise until a demand was made for payment of the mortgage debt; and no effective demand was made. The only demand was that of October 9, 1930, and that demand was not acted upon by either side; subsequent advances were made, and further security given by the appellant which covered both the new advances and the old debt. The former demand was thereby waived, and a new demand was necessary before the Bank could sell: *Bolton* v. *Buckenham.* (1)

Moreover, even if their right to sell had accrued, s. 101 of the Law of Property Act, 1925, enabling a mortgagee to sell the mortgaged property "or any part thereof" would not help the respondents, for that section contemplates a material part or parcel of the mortgaged property such as a field parcel of a farm: *In re Yates. Batcheldor* v. *Yates* (2); *Born* v. *Turner* (3); but not an interest in the sense in which a legal interest differs from an equitable interest; and assuredly the section does not enable a mortgagee to sever the equitable interest from the legal estate and sell the former so that the mortgagor on redeeming could only have the legal estate conveyed to him with the equitable estate outstanding in a third person. The result is that the appellant is entitled to have his name restored to the register free from any trust in favour of T. H. V. Hunter, and entitled to redeem the shares on paying the amount due to the Bank.

(1) [1891] 1 Q. B. 278.

(2) (1888) 38 Ch. D. 112, 128.

(3) [1900] 2 Ch. 211, 214.

Counsel also contended that at 13*l*. 6*s*. 8*d*. the shares had been grossly undervalued on the pretended sale to T. H. V. Hunter.

Oct. 18. *Gavin Simonds K.C.* and *H. Wynn Parry* for the respondents T. H. V. Hunter and Thomas Hunter, Ld. *F. J. Tucker K.C.* and *W. Gordon Brown* for the respondents Lloyds Bank, Ld., J. Lyford, C. H. Lindop and W. R. Smith.

The sale of the 1146 shares to T. H. V. Hunter was not a nullity. A share in a private company is as much a right of property as is a share in a public company. It is true that the sale was not effected in the manner provided by the articles of association, but that merely means that it was transacted in breach of the contract between the appellant and the other members of the Company. It was not ultra vires of the Company, and it could have been confirmed and ratified by all the members: *Salmon* v. *Quin & Axtens, Ld.* (1); *Hickman* v. *Kent or Romney Marsh Sheep Breeders' Association.* (2) But the appellant is not one who can complain of the breach of contract, because it was he who enabled the breach to be committed and the sale to be carried out: *Towers* v. *African Tug Co.* (3) Therefore the transfer by the appellant to the Bank was either a valid transfer or at any rate one which he is estopped from disputing, and the sale by the Bank to T. H. V. Hunter is equally valid, provided that the Bank had a right to sell. It is submitted that they had this right. The demand which they made on October 9, 1930, was never withdrawn. On that date they had a right to sell. Nothing short of a contract for good consideration could devest them of that right, and no such contract was ever proved. It is true that they were ready to negotiate and give time rather than proceed to extremities, but these attempts to adjust matters did not amount to an accord and satisfaction of the right of the Bank to sell if the negotiations fell through, and their right to sell was not thereby affected.

The fact that in Mrs. Emily Hunter's action the name of the appellant has been restored to the register of shareholders does not prevent this House from removing his name in another proceeding. The decree in that case is not in truth a judgment in rem like the pronouncement of a matrimonial Court establishing a marriage or that of an Admiralty Court condemning a vessel. But even if it were, it would be within the power of a Court of equity to declare in a proper case that a legal owner holds as trustee for one who is in truth the beneficial owner, and the present is a good instance of such a case, seeing that the appellant escaped a decree in an action by the Bank for foreclosure and obtained further credit on the footing that he should transfer the beneficial ownership in the shares which they held as security.

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(1) [1909] 1 Ch. 311. (2) [1915] 1 Ch. 881.
(3) [1904] 1 Ch. 558.

Oct. 22. *Sir Gerald Hurst* in reply. It is not necessary for the appellant to contend that by no means other than those provided by the articles of association can a sale of shares in the Company be effected. The act of the secretary in placing T. H. V. Hunter on the register might have been ratified by all the members. But this was not done.

The House took time for consideration.

1936. Jan. 27. Viscount Hailsham L.C. My Lords, this is an appeal, with a cross-appeal, from an order of the Court of Appeal, which varied a judgment of Bennett J.

The relevant facts are somewhat complicated and require to be stated.

There existed in 1927 (and still exists) a prosperous Company called Thomas Hunter, Ld., which was registered as a private Company with a capital of 75,000*l.* divided into 7500 shares of 10*l.* each, of which 6001 had been issued. The plaintiff Samuel Hunter was the registered holder of 1146 of those shares. The remaining shares were held as to 2147 by his brother the defendant Thomas Henry Victor Hunter (who has been referred to as, and whom I will call, Harry Hunter), as to 1146 by another brother Leonard Hunter, as to 1146 by another brother Frederick Hunter, as to 346 by a sister Mrs. Wattleworth, as to 50 by their mother Mrs. Emily

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Hunter, and as to 20 by Mr. Neeves. The directors at the relevant dates were Harry Hunter, Leonard Hunter, Frederick Hunter, Mrs. Wattleworth and Mr. Neeves. The plaintiff and Mrs. Emily Hunter were not on the board.

The plaintiff was also interested in a less prosperous Company called A. M. Cawthra & Co., Ld., of which he was a director and chairman. This Company had an overdraft with Lloyds Bank, Ld., at its Leicester branch, the payment of which was guaranteed by the plaintiff. By way of security for his guarantee the plaintiff had, on December 19, 1927, deposited with the Bank debentures, owned by him, of the Cawthra Company, and on the same date executed a memorandum of deposit in favour of the Bank. The terms of this document are of importance. It provides (by clause 1) that all stocks and shares and all securities marketable or otherwise, and all negotiable instruments, scrip, bills of lading, dock warrants, delivery orders, documents of title and policies (all of which are thereinafter included in the expression " securities ") which, or the certificates of which, were then or might at any time thereafter be lodged with or held by the Bank, or which had been or might be transferred to the Bank or the Bank's nominees, should be and remain a continuing security for the payment and satisfaction on demand of all money and liabilities which then were or at any time thereafter might be due from the plaintiff to the Bank.

Clause 2 conferred a power of sale on the Bank in the following terms: " If I make default in paying further securing or satisfying to you on demand any money or liability hereby secured you may without further notice sell or dispose of any securities subject hereto or any part thereof or any substituted securities in such manner and for such consideration (whether payable or deliverable immediately or by instalments) as you may think fit "—and there follows provision for the disposition of the proceeds of sale.

By clause 4 the plaintiff undertook to execute and sign all transfers, powers of attorney and other documents which the Bank might require for perfecting their title to any securities subject thereto or for vesting or enabling the Bank to vest the same in themselves or their nominees or in any purchaser.

Subsequently (in January, 1928), the plaintiff deposited with the Bank 800 of his Hunter shares, which accordingly became subject to the terms of this memorandum. In July, 1930, the Bank took from the plaintiff a signed transfer in blank of these shares, but he told them at the time that under the Company's articles of association the shares could not be registered in the names of the Bank's nominees. This was a reference to the provisions in those articles which (the Company being a private company) restricted the rights of transfer. I will refer to these in detail hereafter.

On October 9, 1930, by which time the plaintiff's guarantees covered sums amounting to 28,000*l.*, the Bank sent to the plaintiff a formal demand in writing in these terms: " A. M. Cawthra & Co., Ld. We are writing to give you formal notice of demand for repayment under the terms of the undermentioned guarantees given by you on behalf of the above company." This demand makes no specific reference to the memorandum of deposit, but the case was argued upon the admitted basis that if nothing else had happened the Bank would, on default by the plaintiff in making the repayment demanded, have been entitled to exercise the power of sale conferred by the memorandum.

Something else, however, did happen. In addition to demanding repayment under the guarantees, the Bank contemplated appointing a receiver under the Cawthra debentures. A correspondence ensued and interviews took place. On October 29, 1930, the plaintiff wrote to the Bank asking the Bank to say " 1. (*a*) whether they wish the account to be closed altogether, (*b*) if so how long they will give me to raise the necessary money to pay off the overdraft ; 2. if the Bank are prepared to help at all, what overdraft limit are they prepared to grant for the next twelve months, and what security do they require for this loan." The Bank replied on November 4, 1930, that " the Bank does require repayment of the advance without further delay, and if it is desired to stave off the receivership beyond the date of our original intimation, *i.e.*, November 9, we must have our security supplemented by approved security to the extent of 5000*l.* and it will be necessary also to have the 800 shares in Thomas Hunter, Ld., which are deposited with us registered in the names of the Bank's nominees in the books of that Company." On November 6, 1930, an interview took place and it was agreed that the plaintiff would within a limited time provide 5000*l.* additional security, that the Bank's nominees should go on the register of Thomas Hunter, Ld., in respect of the deposited shares, and that the appointment of a receiver under the debentures should be postponed for three months. Accordingly on November 10, 1930, the plaintiff deposited certificates for his remaining 346 shares in Thomas Hunter, Ld., with the Bank, and signed transfers thereof. On November 17, 1930, the certificates covering the 1146 shares and the transfers thereof, with the names of the Bank's nominees Messrs. Ragg and Lyford filled in as transferees, were sent by the Bank in a letter addressed to Harry Hunter, asking to have the transfers registered and the relative certificates returned in due course. On December 22, 1930, Harry Hunter sent to the Bank a certificate for the 1146 shares in the names of Messrs. Ragg and Lyford. It now transpires that the transfers were passed and the new certificate was issued by Harry Hunter without the authority of any resolution of the board, and that his action in this behalf was confirmed at a board meeting on February 12, 1931, at which all the directors (except Mr. Frederick Hunter) were present.

In the middle of that month the Bank were being offered an additional security by the plaintiff in the shape of his reversionary interest in one-fifth of his father's estate, with the result that on March 3, 1931, the Assistant Manager of the Leicester branch wrote to the plaintiff that the head office had sanctioned an overdraft limit of 29,000*l.* on the Cawthra Company's account until August 24, 1931; and on April 15, 1931, the plaintiff executed a mortgage under seal in favour of the Bank. This document needs careful scrutiny. It recites (1.) the will of the plaintiff's father, and (2.) that the plaintiff has guaranteed the Cawthra Company's account with the Bank " by reason whereof he may become indebted to the Bank in certain moneys " and that he has agreed to secure the payment of the same in manner thereinafter appearing. By clause 1 the plaintiff covenants with the Bank to pay them on demand all money and liabilities which then were or at any time might be due owing or incurred from or by the Cawthra Company or the plaintiff to the Bank together with interest. By clause 2 the plaintiff assigned his reversionary interest under his father's will to the Bank subject to a proviso for reassignment if upon such demand as aforesaid he should pay to the Bank all the principal moneys liabilities interest and other money thereby covenanted to be paid. Clause 6 runs thus: " Nothing herein contained shall operate so as to merge or otherwise prejudice or affect any bill note guarantee mortgage lien or other security which the Bank may for the time being have for any money intended to be hereby secured or any right or remedy of the Bank thereunder."

By clause 13 it was provided that the total sum " secured and recoverable " thereunder should not exceed a principal sum of 13,000*l.*, but the limit of recoverability should not in any way prejudice or affect any right of the Bank independently of this deed to recover the total sum due from the Company or the plaintiff.

Later in that year the question of the Cawthra Company's overdraft came again under consideration by the Bank. On October 22, 1931, the Bank wrote to the plaintiff a letter in which, after stating that the Bank had decided that a very considerable reduction must be made in the overdraft, they said: " We wish you please to take steps to realize your shares in Thomas Hunter, Ld., and to raise a private mortgage through one of the companies dealing in this class of business upon your reversionary interest. We think you should be able from these two sources to realize for the reduction of the account at least 21,500*l.*, leaving with us an overdraft of only 8000*l.* I will ask you please to give this your immediate attention and I hope you will be able to get something definite arranged in the next two weeks. We do not wish to have to deal with the securities ourselves, as we feel sure you will be able to get better prices than we should." On November 10, 1931, the Bank again wrote to the plaintiff: "With reference to my letter of the 22nd ulto. will you please advise me whether you have come to any arrangement yet for the sale of your shares in Thomas Hunter, Ld., and for the sale also of your reversionary interest. If you are not able to do anything on these lines, we propose on the 17th inst. to deal with the securities ourselves." The plaintiff made no sale of the shares, with the result that the Bank proceeded to realize them.

In order to appreciate the steps which were taken for this purpose it is necessary to refer to the relevant articles of association of Thomas Hunter, Ld. Article 6 provides that the Company shall be entitled to treat the person whose name is on the register in respect of any share as the absolute owner thereof, and shall not be under any obligation to recognize any trust or equitable claim to or partial interest in such share. Article 17 is all-important and runs thus:—

"17. No member shall be entitled to transfer any share otherwise than in accordance with the following provisions:—

(*a*) A member desirous of selling his shares (hereinafter called 'the selling member') shall give a notice (hereinafter called 'the notice of sale') to the secretary of the Company containing an offer to sell the same, and stating the number of shares which he desires to sell and the price which he is willing to accept for such shares, which price shall be a price to be fixed and certified by the auditors or auditor of the Company for the time being, and which price when so fixed shall be deemed to be the fair price and final and binding.

(*b*) The secretary shall thereupon (subject to the rights of Thomas Henry Victor Hunter as hereinafter mentioned) send to each of the other members of the Company a circular containing the same particulars and naming a day (being twenty-one days after the receipt by him of the notice of sale) on or before which offers to purchase the said shares will be received. If on or before the day so named offers to

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purchase all or any of the shares referred to in the notice of sale at the price named shall be received from members of the Company by the secretary, he shall (subject as aforesaid), as agent for the selling member and the proposing purchaser or purchasers, declare a contract of sale to be concluded, and (subject as aforesaid) shall give notice thereof to the selling member and the purchaser or purchasers: Provided always that so long as the said Thomas Henry Victor Hunter shall be a member of the Company and shall be the holder of at least one thousand shares in the capital of the Company, and shall at that time be the managing director of the Company, his offer of the purchase of the whole or any of the shares of any member desirous of selling the same shall take priority over any offer of purchase made by any other member of the Company.

(*c*) If the offers for purchase shall together constitute offers to purchase a greater number of shares than those offered for sale, the shares offered for sale shall (subject to the priority of the said Thomas Henry Victor Hunter as aforesaid) be divided amongst the proposing purchasers in proportions as nearly as possible in which they already hold shares in the Company: Provided that no proposing purchaser shall be liable to take more shares than those he shall have offered to purchase, and any shares which cannot be so divided as aforesaid without creating fractions shall be apportioned by lot among the proposing purchasers. The selling member and the members declared to be the purchasers of shares shall give effect to the contract or contracts so made as aforesaid by the execution of proper transfers and the payment of the purchase price.

(*d*) If within one calendar month after the service of the notice of sale on the secretary the selling member shall not receive notice that his offer to sell is accepted on behalf of some member or members of the Company, he may within four calendar months from the date of serving the notice of sale, subject to article 18 hereof, sell or dispose of the shares referred to in such notice of sale, or so many of them as shall not have been agreed to be purchased by a member or members of the Company to any other person, provided that such sale or disposal be at a price not less than the fair price as hereinbefore provided.

(*e*) A notice of sale may be renewed from time to time, but the offer therein contained shall not be withdrawn until the expiration of twenty-one days from the time of the service thereof on the secretary.

(*f*) If any person shall become entitled to any share by reason of the death or bankruptcy of any member he shall (subject as hereinafter mentioned) be bound forthwith to offer the same for sale to the members of the Company at a fair price, such fair price (unless otherwise mutually agreed) to be determined as hereinbefore mentioned in sub-article (*a*) hereof, and so soon as the said fair price shall have been determined the said person shall give to the secretary a notice of sale in the manner hereinbefore mentioned containing as the price which he is willing to accept the said fair price, and the same results shall follow as in the case of a notice of sale voluntarily given. If the said person shall fail to give such notice of sale the Directors may, as his agents, give the same for him: Provided always that the said Thomas Henry Victor Hunter, so long as he is a member of the Company and shall be the holder of at least one thousand shares in the capital of the Company and shall at that time be the Managing Director of the Company, shall have the first option of purchasing such shares as aforesaid and as provided by sub-article (*b*) of this article.

(*g*) Any member may by will bequeath any share held by him to a member or members of his family as hereafter defined, and in such case the foregoing provisions shall not apply; and in the case of such bequest the executors of the deceased member may transfer the shares so bequeathed to the legatee or legatees. For the purposes hereof 'a member of the family' of any member shall include a husband, wife, son, daughter, grandchild, or other direct issue of such member, or a father, mother, brother, sister, nephew, or niece of such member, but no other person.

(*h*) Where any shares are held upon the trusts of any deed or will a transfer thereof may be made upon any change or new appointment of trustees, but the directors may require evidence to satisfy themselves of the facts in relation to such transfer."

Article 18 gives the directors power at any time in their absolute and uncontrolled discretion to refuse to register any proposed transfer of shares.

The steps required to be taken by a member desirous of selling his shares were all taken in regular form. The auditor on November 17, 1931, fixed the sum of 13*l.* 6*s.* 8*d.* as the price. Mr. Lyford as the surviving registered holder (Mr. Ragg having died) gave a notice to the secretary the next day containing an offer to sell the 1146 shares at the price of 13*l.* 6*s.* 8*d.* per share. On the same day the secretary gave the requisite notice to the other shareholders, and on the same day Harry Hunter offered to purchase all the shares at the fixed price, thus exercising his priority rights. On November 26, 1931, the plaintiff's solicitors, by letter to the Bank's solicitors, protested against the sale of the shares, alleging that the price was ridiculous and out of all proportion to the true value of the shares; to which the Bank's solicitors replied that the price was fixed by the articles of association. Eventually on December 19, 1931, the secretary declared a contract to be concluded for the sale by the Bank and the purchase by Harry Hunter of the shares.

On April 4, 1932, Mr. Lyford executed a transfer of the 1146 shares to Harry Hunter, expressed to be in consideration of 15,280*l.* By a transfer of the same date Harry Hunter transferred the 1146 shares and 850 additional shares (making in all 1996 shares) in Thomas Hunter, Ld., to Messrs. Lindop and Smith, the nominees of the Bank. In the interval, since the contract had been declared concluded, the Bank had agreed to finance Harry Hunter on the purchase by means of an overdraft, secured by the 1996 shares (amongst other securities); and on April 7, 1932, by letter of that date, the Bank acknowledged the receipt of his cheque for 15,280*l.* "in respect of the purchase of Thomas Hunter Ld. shares."

At a meeting of the directors of Thomas Hunter, Ld., held on April 8, 1932, it was resolved that the transfer Lyford to Hunter of the 1146 shares be passed and a new certificate be issued in the name of Harry Hunter and that it be sealed and countersigned in the normal manner. At the same meeting it was resolved that the transfer Harry Hunter to Lindop and Smith of the 1996 shares be passed and that a certificate be issued in the names of Lindop and Smith. A certificate in these names for the 1996 shares was sealed by the Company and countersigned by two directors and the secretary accordingly.

On August 17, 1932, two writs were issued in the Chancery Division. By the first the mother, Mrs. Emily Hunter, sued as plaintiff on behalf of herself and all other the shareholders of Thomas Hunter, Ld., except Harry Hunter; the defendants being Harry Hunter, the present appellant, Samuel Hunter, the Bank, Mr. Lyford, Thomas Hunter, Ld., Messrs. Lindop and Smith and Mrs. Irene Hunter. In that action the mother claimed that the transfers of the 1146 shares to Messrs. Lyford and Ragg were made in contravention of article 17 of the Company's articles of association; that accordingly the transfers and the registration of Messrs. Lyford and Ragg as holders of the shares were null and void. She made similar claims in regard to the transfers of the 1146 shares by Mr. Lyford to Harry Hunter, and the transfers of those shares and the 850 shares by Harry Hunter to Messrs. Lindop and Smith, and in regard to the registration of Harry Hunter as holder of the 1146 shares, and the registration of Messrs. Lindop and Smith as the holders of the 1146 shares and the 850 shares. Further she claimed rectification of the Company's register of members by restoring the name of Samuel Hunter as the holder of the 1146 shares, and by restoring the name of Harry Hunter as the holder of the 850 shares. There was also included in the writ a claim to relief in connection with the appointment of Mrs. Irene Hunter as a director of the Company, but with that we are not concerned.

By the second writ, Samuel Hunter sued Harry Hunter, the Bank, Mr. Lyford, Thomas Hunter, Ld., Messrs. Lindop and Smith and the Cawthra Company, claiming redemption of the

1146 shares and the other property held by the Bank as security for his guarantee, his claim to redemption being preceded by claims (1.) that the transfer of the 1146 shares to Messrs. Lyford and Ragg, being in contravention of article 17 and therefore null and void, the registration of those gentlemen as members in respect of those shares was null and void; (2.) that accordingly the transfer of the 1146 shares to Harry Hunter, and by him to Messrs. Lindop and Smith, and the registration of those three persons as members in respect of those shares were null and void; and (3.) that the register of members of Thomas Hunter, Ld., be rectified by restoring the name of the plaintiff as the holder of the 1146 shares. There was also a claim to set aside the transfer to Harry Hunter on the ground of the sale having been made at a gross undervalue.

Both these actions came for trial before Bennett J., who on January 15, 1934, gave judgment in the mother's action. He held that article 17 prohibited a member from making any transfer of any share except such transfers as were expressly authorized by the article, and that therefore a transfer of shares by way of security was not permitted. He further held that the transactions complained of were not mere irregularities in the internal management of the Company capable of being regularized by the shareholders. He thought that an order should be made for rectification of the register "by restoring to it the name of Mr. Samuel Hunter as the holder of the 1146 shares . . . . and the name of Mr. Harry Hunter as the holder of the 850 shares." The order as drawn up runs thus in relation to the 1146 shares :—

"It is ordered that the register of members of the defendants, Thomas Hunter, Ld., be rectified by striking out the names of the defendants, Cecil Heane Lindop and William Robert Smith, as shareholders of the defendants, Thomas Hunter, Ld., in respect of 1146 fully paid ordinary shares in the capital of the defendants, Thomas Hunter, Ld., and numbered 801 to 1600, 3497 to 3792, and 5781 to 5830 both inclusive and by inserting in lieu of the names of the defendants Cecil Heane Lindop and William Robert Smith the name of the defendant

Samuel Arthur Hunter as such shareholder in respect of the said shares."

Bennett J. gave judgment in the second action, which is the action giving rise to the present appeal, on February 16, 1934. He first dismissed a charge of fraud against Harry Hunter with which we have no concern. He then referred to his judgment in the mother's action, in which he said he had decided (1.) that the articles of association did not permit a shareholder to make a transfer of shares by way of security; (2.) that they did not permit a transferee to whom such a transfer had been made to be registered as a shareholder; (3.) that a person so registered was not a member entitled to give a sale notice; and (4.) that the register ought to be rectified by removing the names of Messrs. Lindop and Smith and restoring the name of the plaintiff as the holder of the 1146 shares. He held that the Bank were in a position to realize their security at all times after October 9, 1930, and that the plaintiff was not estopped from denying the validity of the sale; and he further held that there having been no valid sale of the shares the plaintiff was entitled to redeem them. The Bank had counterclaimed for foreclosure of their securities other than the shares, and also of the shares in the event of the plaintiff succeeding in his action. Bennett J. made one order in the action and counterclaim declaring the plaintiff's right of redemption to be still subsisting, ordering the necessary proper accounts and inquiries, redemption of all securities on payment by the plaintiff to the Bank within a specified time of the amount certified to be due, rectification of the register of members in respect of the 1146 shares in the same terms as those contained in the order made in the mother's action, and ordering foreclosure in default of the plaintiff paying to the Bank the certified amount within the specified time.

Two appeals were lodged against this judgment, one by Harry Hunter and Thomas Hunter, Ld., asking that the action be dismissed with costs; the other by the Bank and their nominees asking for a dismissal of the action, and for foreclosure of the securities other than the 1146 shares upon the footing that the sale was valid, credit being given for the proceeds of sale. Appeals were also lodged by the same parties against the judgment in the mother's action.

The appeals were heard together and the appeals in the mother's action were dismissed. From that decision there has been no appeal to your Lordships' House. The order made in that action for rectification of the Company's share register accordingly stands.

The appeals from the judgment in Samuel Hunter's action were allowed and the judgment varied so as to consist of and contain the following provisions :—

(1.) A declaration that the sale of the 1146 shares to Harry Hunter operated as a sale of the equitable interest in the shares.

(2.) An order that the Bank recover against the plaintiff under his guarantees a specified sum which was arrived at after deducting the proceeds of the sale of the shares.

(3.) An order for rectification of the register as made by Bennett J.

(4.) An order that the plaintiff do execute and deliver to the Bank a declaration of trust of the shares in favour of Harry Hunter and the Bank, or as they should direct.

(5.) An order for accounts for the purpose of ascertaining what was due to the Bank under their securities (other than the shares) upon the footing of credit being given for the proceeds of the sale of the shares.

(6.) Orders for redemption on payment or for foreclosure in default.

The construction placed by Bennett J. upon article 17 was unanimously upheld by the Court of Appeal, as was also his decision that a breach of the article was not a mere irregularity in the internal management of the Company capable of being regularized by the shareholders. The transfers and registrations in breach of article 17 were treated as inoperative, and the sale notice given by Mr. Lyford was held to be ineffectual. The Master of the Rolls was, however, of opinion that there had been a sale of the plaintiff's equitable rights to the shares, the consequence of which was that the plaintiff's right to redeem the shares had been lost. He thought that no estoppel could be raised against the plaintiff and that the question of price was concluded by the provisions of article 17. Romer L.J. thought it unnecessary to consider any question of estoppel although he agreed with the views expressed thereon by the Master of the Rolls. He stated that in view of the decision in the mother's action the only question remaining in Samuel Hunter's action was whether he had lost his right of redeeming the shares by reason of there having been a sale of the equitable interest in them. He considered such a sale to have been effected because, although the sale purported to be a sale of the legal interest and was abortive as such, Harry Hunter could and did say that instead of rescinding the sale he would be content with the equitable interest only. The learned Lord Justice then considered the contention that a sale of the equitable interest was not binding on the plaintiff because of (1.) absence of a power of sale and (2.) insufficiency of price. He held that a power of sale was brought into being by the demand of October 9, 1930, and was not put an end to by the mortgage of April 15, 1931, but was in terms kept in being by the provisions of clause 6 thereof. As to undervalue he held that there was no ground on which the Court could possibly arrive at the conclusion that the sale was effected at a gross or any undervalue. Maugham L.J. held that the transfers by Samuel Hunter passed the equitable interest in the shares to Messrs. Lyford and Ragg, that the Bank was entitled to sell and did sell that interest under their power of sale, and that accordingly the plaintiff had lost his right to redeem the shares. He agreed with what Romer L.J. had said as to the existence of the power of sale.

From that order of the Court of Appeal the plaintiff has appealed to this House and asks that the order of Bennett J. be restored. By way of cross-appeal Harry Hunter, the Bank, the Bank's nominees, and Thomas Hunter, Ld., complain of the order of the Court of Appeal in so far as it orders rectification of the Company's register and declares that the sale to Harry Hunter operated as between the Bank and the plaintiff only as a valid sale of the equitable interest in the shares.

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Having now stated the facts relevant to this matter, I proceed to consider the various points which arise for decision.

The first question is whether there was any right of sale in the Bank at the date when the Bank purported to effect the sale of the shares. It is admitted that the right to sell came into existence on October 9, 1930, on receipt by the plaintiff of the letter of that date. The Court of Appeal, affirming the trial judge on this point, has held that this right was kept alive by virtue of clause 6 of the mortgage of April 15, 1931. My Lords, I find myself unable to concur in that conclusion. I think that the true view of what happened is that the Bank, after having made a formal demand for repayment, agreed in November, 1930, to accept further security in lieu of repayment. Thereafter the right to sell ceased to exist, because there was no longer any default in payment, and clause 6 could not keep alive a right or remedy of the Bank which was no longer in existence. It was urged at the Bar that the effect was merely to suspend the right of sale until August 24, 1931. In my judgment this is not the true view: the demand of October, 1930, had been satisfied by acceptance of further security and a fresh demand was necessary to bring the right of sale into operation. It was further argued that the letters of October 22, 1931, and November 10, 1931, were in effect such a demand: but when scrutinized they do not bear that construction. The earlier letter merely asked the plaintiff to sell his shares and the later one stated that if he was unable to do so the Bank would sell the shares themselves. I have felt some regret in reaching this conclusion. I have no doubt that the Bank acted in perfect good faith, and that the plaintiff had full notice of what they were doing; and if he had objected at the time, the Bank would undoubtedly have served a formal demand which he could not have met. But the right of sale is a very drastic remedy, and it is essential for the due protection of borrowers that the conditions of its exercise should be strictly complied with. In the present case this was not done, and it follows that in my judgment the plaintiff is entitled to succeed on this ground. This is

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sufficient to dispose of the case, and any observations on other points raised can have no binding authority. Nevertheless, in view of the very full argument addressed to your Lordships, and of the judgments of the Court of Appeal, I desire to state my views shortly.

I am satisfied that the construction placed on article 17 by both Courts is right, and that the steps taken to put the nominees of the Bank on the register were not in accordance with the terms of the article. This construction does not prevent a mortgage of the shares or their sale by the mortgagees in default of payment of the mortgage debt. But the sale must be effected in accordance with the terms of the article. The Bank could have taken from the plaintiff letters addressed to the auditor and to the secretary respectively in blank, or they could have taken a power of attorney from the plaintiff to write such letters in his name and on his behalf. I do not think that the disregard of article 17 rendered the transaction ultra vires the Company, or that it could not have been regularized by the assent of all the shareholders; but that assent was never obtained. I do not think that there is any estoppel which prevents the plaintiff from raising his present contention. I think the true view of the facts is that the plaintiff told the Bank quite plainly the terms and effect of the articles of association, and he warned them that the shares could not be validly registered in the names of their nominees: since the Bank insisted on getting their nominees on the register as a condition of continuing the overdraft, the plaintiff was willing to allow that to happen; but that did not preclude him from asserting what he had always made clear to the Bank, that the registration was ineffective to make them the legal owners of the shares.

I cannot accept the view of the Court of Appeal that the transaction between the Bank and Harry Hunter operated as a valid sale of the equitable interest in the shares. A mortgagee of shares cannot split up the interest of the mortgagor and sell the mortgagor's beneficial interest while retaining for himself the legal title, any more than a mortgagee of a house can sell the fixtures in the house leaving the mortgagor the equitable owner of what is left: *In re Yates.* (1) If the Bank had been selling the equitable interest of the plaintiff in the shares, none of the provisions of article 17 as to the restriction on the possible purchasers, or as to the method of fixing a price, would have been effective; it would have been quite a different transaction from a sale of the shares. The Bank of course could sell their own interest in the shares by assigning their rights as mortgagees: but the Bank had no right to sell the plaintiff's beneficial interest apart from his legal ownership. I have not found it necessary to determine the effect of the judgment in Mrs. Hunter's action on the points at issue in this action, or the extent to which it was open to the respondents to raise the various questions argued in this case whilst the decision in Mrs. Hunter's case to which they were parties remained unchallenged.

It follows that in my opinion the appeal should be allowed and the cross-appeal should be dismissed with the usual consequences as to costs, and I move your Lordships accordingly.

I would add only that in restoring the judgment of Bennett J. it will be necessary to vary that judgment so as to ensure that any times mentioned therein which, under that order, would have commenced to run at the date of that judgment, should commence from the date of the order of this House.

LORD BLANESBURGH. My Lords, I have had the advantage of reading in advance the judgment just delivered by the Lord Chancellor and I find myself in complete accord with the conclusions reached by him on each of the two broad questions raised by this appeal.

On the first question whether—as I would phrase it—there was on December 19, 1931, still operative and unsatisfied a demand upon the appellant to pay to the Bank the debt secured by the memorandum of charge of December 19, 1927, I do not, while fully appreciating its force, share the doubt of my noble and learned friend Lord Atkin resulting from the

(1) 38 Ch. D. 112.

suggestion that the arrangement which followed the demand of October 9, 1930, had no further effect than to suspend the operation of that demand for a term of three months.

My Lords, I think the true effect of the arrangement in question was that there should be no demand at all for three months and that the Bank at the expiration of that term should have its liberty of realization restored if, on a survey of the situation and after a fresh demand, the Bank decided upon that course. But any doubt on this subject is, I think, resolved by a very clear recital in the mortgage deed of April 15, 1931—a deed which the Lord Chancellor has already analysed. It may not be amiss to note how great, and in two directions, is the influence of that deed upon this first question.

Bennett J.'s conclusion upon that question, as expressed in his judgment, was that the Bank was in a position to realize its security at all times after that letter of demand of October 9, 1930. The learned judge apparently attributed no effect, even temporary, to the arrangement under which further security following that demand was accepted by the Bank. That arrangement did not secure, it seems, for the appellant even a respite of three months. And this must, I think, have been the view also of the Court of Appeal. For it is there assumed, again without any reference to that arrangement, that at the date of the mortgage of April 15, 1931, the power of sale still continued, so that, as stated by Romer L.J., the only question was whether that power then ceased to be exercisable without a new demand by reason of the appellant's fresh covenant in the deed contained to pay "on demand" the amount of his total indebtedness. And, in the opinion of the Lord Justice, following here the judgment of the Master of the Rolls, nothing of that kind had happened. The power of sale which might perhaps have been regarded as effectively superseded by the fresh covenant had been kept alive by clause 6 of the deed.

But, my Lords, this reasoning is, I suggest, effectively countered by a recital in the deed itself, which apparently had not in this connection been brought to the notice of the Lord Justice. It is a recital which at once, as I think, destroys the assumption on which his judgment on this point is based

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while it removes the doubt expressed by my noble friend opposite, and definitely resolves in favour of the appellant's view an ambiguity that might otherwise have remained open. In the deed, immediately before the appellant's covenant for payment "on demand" which is in the most comprehensive terms, there is discovered this recital—the second of two—in which is stated the position as to indebtedness of the appellant to the Bank at the date of the deed. For convenience of reference I set it forth in full: "The mortgagor has guaranteed the account of A. M. Cawthra & Co., Ld., of Benson Street in the City of Leicester . . . . with the Bank by reason whereof he may become indebted to the Bank in certain moneys and the mortgagor has agreed to secure the payment of the same in manner hereinafter appearing."

Now, my Lords, that recital, as I read it, referring unambiguously to the moneys secured by the memorandum of deposit, all of which under the respective guarantees were payable only on demand, indicates in words as clear as words short of express statement can indicate, that while the appellant may later become indebted on his guarantees, he is not yet so indebted. The recital is aptly framed to introduce appropriately the covenant which immediately follows to discharge (inter alia) that indebtedness "on demand," that is to say, as I read it, only on demand. For myself I construe the recital as stating exactly the result reached by the Lord Chancellor apart from it. It shows, I suggest, that the parties to that deed, the appellant and the Bank, each of them, doubtless through their advisers, interpreted the transaction following the demand of October 9, 1930, as he has interpreted it. The appellant was not, on April 15, 1931, indebted because there was not then in existence any demand upon him unfulfilled. And if that be so, clause 6 of the deed, on which the Court of Appeal alone relied, ceases on the present question to have any relevance at all. For from the recital as above interpreted it follows as a necessary conclusion that at its date the power of sale under the memorandum of December 19, 1927, had not arisen. There was nothing then for clause 6 to keep alive.

And my Lords, this deed of April 15, 1931, charging by way of further security the appellant's reversionary interests in favour of the Bank, throws also a striking light upon the respondents' final contention on this question of demand: namely, that if the demand of October 9, 1930, must be regarded as spent, the so-called demands of October 22 and November 10, 1931, unfulfilled at the date of sale, took its place.

Now it is interesting to regard these letters, and particularly that of November 10, in the light of the mortgage of April 15, 1931, for that mortgage confers on the Bank a power of sale over the mortgaged property, that is the reversionary interest, but (by para. 4 of the deed) only after the expiration of one month from the date of demand. The shares on the other hand might be sold, it will be remembered, immediately on demand made. By the letter of November 10, however, as has been seen, the Bank's power of sale over the shares and over the reversionary interest is treated as being exercisable and is notified for exercise on or after the same day and that one week later, that is to say, on or after a day appropriate to neither security and, in relation to the reversionary interest, premature, even if the demand were to be dated October 22. Here is to my mind a further justification for the conclusion that these letters were not nor was either of them intended to be such a demand as is required either by the memorandum of charge or the mortgage—or indeed any demand at all. The truth is, as a review of all the facts of this case reveals, that except as a prelude to the appointment of a receiver under the Cawthra debentures in October, 1930, the Bank throughout acted as if no demand for payment prior to realization was ever called for: while so far as the debentures were concerned the demand addressed as it was to the appellant on behalf of the Company at his private house at Leamington Spa was, unless the debentures are in a form almost unknown—(the form of debenture is not printed in the record)—for the purpose for which it was given quite worthless. See *Thorn* v. *City Rice Mills.* (1)

My Lords, it is, I think, salutary that the necessity for the appellant being in default under an existent demand for payment before any power of sale under the memorandum of charge could arise should be once again affirmed by this House. Whatever may have been thought of this question elsewhere (and it received very slight consideration in the judgments under review) it has, as presented here, become one of principle, not only of major importance in this action to the appellant, but of deep interest generally to borrowers on security to whom it would too frequently be disastrous if there were permitted any relaxation of the rule whereby invariably and strictly a lender is held to the fulfilment of every condition made, by the instrument, precedent to the exercise by him of any power of sale over the mortgaged property. The condition in this instance was a very small protection to the appellant. So much the stricter was the Bank's duty to fulfil it. Here, however, on the part of the Bank's officials the duty was either neglected or forgotten.

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(1) (1889) 40 Ch. D. 357.

But, my Lords, important as is the principle involved in the question so far discussed, it is possibly true, that, in the present case, the answer to it in the appellant's favour will be for him a fortunate accident, it being barely doubtful that had the Bank on the eve of the sale now impugned served upon him a demand, in terms similar, shall we say, to that of October 9, 1930, he would have had neither the means nor the opportunity to stop any sale of his shares otherwise justified by the memorandum of charge.

A judgment favourable to the appellant on the second question raised by the appeal could not, however, be so characterized. Here the position is entirely different. Partly for that reason, and out of deference also to the powerful argument of learned counsel for the respondents upon it, I am tempted, being not perhaps judicially so required, to justify the further conclusion I have reached that the Bank's power of sale here, even if it be assumed that it had arisen, was improperly exercised so that the appellant's right to redeem his shares still remains intact.

My Lords, on this issue, the one question before the House in my judgment is whether or not the appellant, as mortgagor, is bound by the sale to the respondent Harry Hunter of the

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equitable interest in the appellant's mortgaged shares in the terms which were declared by the order of the Court of Appeal, and accepted as binding upon them both by the Bank and by Harry Hunter respectively—whether in other words such a sale was authorized by the memorandum of charge of December 19, 1927, and is, on this record, shown to be binding upon the appellant. I say definitely the one question, because that is the only sale, apart from estoppel with which I will deal separately, that can now be set up by the respondents as an answer to the appellant's claim to redeem his shares.

The first sale—the only sale the Bank ever consciously made—was a sale to Harry Hunter under the Company's articles. That sale has disappeared as the result of the order in Emily's action, and of the rectification of the Company's register of members thereby directed. And even if that order was wrong, the sale it destroyed can never be revived, because the order in Emily's action, whether right or wrong, is now finally binding upon the parties to it, who include the Bank and Harry Hunter as well as the appellant. In these circumstances the decision of the respondents to leave the order in Emily's action standing—presumably because no plea of estoppel against the appellant would avail them then—and to confine their resistance to the rectification of the Company's register to a cross-appeal in this action, where anyhow the plea of estoppel could be set up, might have been a disastrous decision for them, if the rectification directed in Emily's action had in fact followed a mistaken view of the articles. But the course taken has, in the result, done the respondents no harm, because the arguments on this point in the cross-appeal have, I believe, established that the order in Emily's action was perfectly right, and that an appeal against it to this House would have fared no better than did the appeal against it to the Court of Appeal.

But the contention of the Bank and Harry Hunter—it is agreed that throughout Harry Hunter stands in no better or other position than the Bank—to the effect that success on their cross-appeal resulting from estoppel would restore for them at least in substance the original sale, notwithstanding the order in Emily's action, still remains to be dealt with. On this I would say at once, that in my judgment, success in that cross-appeal would be of no advantage to them at all, for the simple reason that the only estoppel ever effective against the appellant, ceased, so soon as, before Bennett J., the order in Emily's action was made: so soon as in the Court of Appeal the appeal from that order was dismissed, and always in this House, where the order has become and must be treated as final and binding.

Bennett J. in his judgment in the present case, referring to that decree in Emily's action which a week before he had made, accurately described, I think, its effect upon the rights of the parties on the present question. "I have to decide the right of the parties" he said, "upon the footing that the articles of association [of the Hunter Company] did not permit the transfer by the plaintiff of his shares to the Bank's nominees Messrs. Lyford and Ragg; nor the registration of them as shareholders, nor any of the subsequent dealings by them with the shares." The decree and the rectification of the Hunter Company's register of members thereby directed brought with it, that is to say, no less a result than that the sale of the shares by the Bank's nominees to Harry was, under the articles, invalid and inoperative. And this is also the basis of the order of the Court of Appeal. It was for this reason that the Court substituted another sale for the sale which had failed, with this consequence, that the only sale of the shares ever deliberately intended and made by the Bank—a sale under the articles—has as a result of the decree in Emily's action disappeared, and that there has been substituted for it, as a disposition binding the appellant, a sale of the equitable interest in the shares outside the articles altogether.

Now, my Lords, the respondents on their cross-appeal challenged the correctness of the construction placed upon the Company's articles of association in Emily's action: and in the alternative they sought to support as a proper exercise of the Bank's power of sale the sale declared in the order of the Court of Appeal to have been made. But the greater part of the argument of counsel was directed to show that the appellant, on the principle of estoppel (I hope I summarize the effect of the argument with sufficient accuracy), was precluded from taking exception to any disposition, whether or not authorized by the memorandum of charge, which pecuniarily secured for him everything which would have accrued to his credit from the sale under the articles, which, as was contended, he was estopped from challenging.

My Lords, the argument was elaborate, and the estoppel in its full extent, as expounded by learned counsel, was to me difficult to follow. I hope, however, that I can in simple terms deal with the problem as I see it.

It has, I think, been a source of great confusion that an order for rectification of the register of the Hunter Company was in identical terms made both in Emily's action and in Samuel Hunter's—the present—action. It is true that Samuel Hunter in this action based the claim to rectification not only on the breach of the articles, involved in the original sale—the only basis of Emily's action—but also upon an allegation that he transferred his shares to the Bank's nominees on Mr. Ragg's promise or representation that the Bank would not attempt to sell them. But, although the learned judge says nothing in his judgment on this subject, it cannot I think be taken that his order for rectification in this action was based on any acceptance by him of that allegation. The order was based, I feel sure, on the same ground as it had been asked for and made in Emily's action. And, my Lords, in the present action an order so inspired cannot, I think, be justified. I agree with Mr. Simonds that Samuel Hunter was estopped from himself taking any objection to the sale on that score: indeed, I go so far as to say that if Emily had brought no action at all, or if no decree had been made in the action which she did bring, the appellant's present action so far as it questioned the sale to Harry Hunter as one unauthorized by the articles must have failed. The position would then have been that with no objection to the registration of the Bank's nominees taken by any shareholder, the appellant by his execution of blank transfers for valuable consideration had himself invited a registration to which accordingly when made he could take no objection. The order directing rectification in this action was, therefore, I think, wrongly made. But it was an order which, possibly now convenient, has been alike superfluous and harmless.

The mistake, as I see it, made by the Bank has been to suppose—I say this with all respect—that with Emily's decree standing, it would advantage them at all to have struck out from the decree in the appellant's action the order for rectification there made. The order in Emily's action was on this subject all the appellant needed, and although estopped from himself claiming such a declaration, he was in no way estopped from taking every advantage from the rectification made at Emily's instance. He had given Emily no assistance in obtaining it. She obtained it by the strength of her own case as plaintiff. The appellant did not even appear at the trial of her action. He had not undertaken to secure the registration of the Bank's nominees as shareholders. He had never represented that they would or could be so registered. On the contrary he informed Mr. Ragg when he handed the first blank transfer to him, that the Bank's nominees could not be so registered. And the Bank had at all relevant times in its possession a print of the Company's articles of association. It seems clear indeed that the appellant's one obligation with reference to registration was to do nothing to prevent it, and no suggestion on this head is made against him. From all this it follows that after the order in Emily's action was made there was no estoppel whatever affecting the appellant: and the judgment of both Courts is on this subject to that extent, I think, undoubtedly correct. The truth is, that the estoppel affecting the appellant was much more limited than the estoppel attributed to him by the respondents. Here lurks the fallacy of their whole argument as I see it. Emily's decree based upon the articles was and remains on this part of the case the real obstacle in their way. It stands. And so long as it stands the sale thereby impugned is at an end as much for the advantage of the appellant as of any one. It follows in my judgment that there is no bar preventing the appellant, as

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mortgagor, from impeaching if he can the only contract for the sale of his shares which for the consideration of the House can now be propounded by the respondents, and I am of opinion for the reasons given by the Lord Chancellor that that contract can in no way be justified under the memorandum of charge, or otherwise. And I say no more on that branch of the case.

But, my Lords, there remains what to my mind is a serious aspect of this sale—an aspect which cannot, I feel, be overlooked, in view of the arguments addressed to the House by learned counsel for the respondents. My Lords, the only contract for sale of the shares which on December 19, 1931, the Bank through their nominee intended to make with the respondent Harry Hunter, the only contract they thought they had made, the only contract they pleaded or sought at the trial to justify was, as I have said, a contract for sale under the articles, at the only obtainable price, with Harry Hunter, if he so desired, the only possible purchaser. So long as the sale was of that character, to Harry Hunter only, at one rigid price, the close association of the Bank with Harry Hunter in relation to the transaction was in a question with the appellant as mortgagor probably one of delicacy only. The Bank were financing Harry Hunter in the transaction, advancing to him the whole purchase price on the security of the purchased shares and some further Hunter Company's shares of his own. This on the authority of *Farrar* v. *Farrars, Ld.* (1), was, in relation to such a contract as that described, quite possibly legitimate. The fact again that the Bank consistently valued the shares at 15*l.*—and their valuations of properties mortgaged to them were markedly conservative (see memorandum February 17, 1931, at p. 214 of the Appendix)—was almost irrelevant when no price beyond 13*l.* 6*s.* 8*d.* per share could be asked for. Hardly more relevant was the fact that the Bank, in view of the value of their other securities for the Cawthra Company's overdraft (see as to this the letter of October 22, 1931), did not for their protection need more from the shares than 13*l.* 6*s.* 8*d.* each, while the further fact that a price so limited made

(1) (1888) 40 Ch. D. 395, 406.

the security for their corresponding advance to Harry Hunter more adequate, the fact in short as it is put in a memorandum of Mr. Lindop of December 21, 1931, in which referring to the financing of Harry Hunter, he says: " I gather that if the Bank agrees to the advance it will be practically transferring the additional limit from a weak holder to a much stronger holder " —all these facts were of no more than sentimental importance to the appellant so long as under a sale of the shares in their entirety 13*l*. 6*s*. 8*d*. per share only could be asked for. Again the obvious anxiety of the Bank that Harry Hunter and he alone should be the purchaser, and that the sale should be effected before Harry Hunter had lost, as was threatened, his position as managing director, and with it his privilege of pre-emption, was again as against the appellant relatively innocuous, as he himself could not be a purchaser, so long as the sale was one under the articles with no right to ask more than the fair price—certified at 13*l*. 6*s*. 8*d*.

But so soon as the position of the Bank comes to be regarded in the light of the sale propounded at the suggestion of the Court of Appeal, one which both the Bank and Harry Hunter have accepted and now put forward as the sale which was then made, the whole situation is transformed. Now we are faced with a sale which need not have been made to Harry Hunter only, nor at a fixed price, but might have been made to any one at any price; we have that contract imposed upon the Bank by the Court of Appeal in an action in which at the trial—and quite properly on the pleadings—all evidence as to the real value of the shares had on the objection of Harry Hunter's counsel been excluded, and when such evidence as there was on the subject of real value—Harry Hunter's reported readiness, for instance, to pay more than 13*l*. 6*s*. 8*d*. per share if pressed, the Bank's own valuation, the auditor's remote justification of his fair price, so far as he gave one at all—indicated that the " fair price " could to say the least hardly be regarded either as a full or even as the best obtainable price. But most important of all, the Bank as at the date of the contract so imposed upon them, had then placed themselves in a position in which it was to their interest to have no increase in the purchase price over 13*l*. 6*s*. 8*d*. per share and to have Harry Hunter and no one else as purchaser. In other words, the Bank by the order of the Court of Appeal have, ex post facto, been fixed with a contract—necessarily of date December 19, 1931—which I make bold to say they would never themselves have concluded at that date, so invidious in reference to such a sale had their own position in relation to the appellant become.

My Lords, this is not a sale which in my judgment, I say so with the utmost respect, ought to have been imposed on the parties or even approved by the Court of Appeal in the then position of the record. That Court apparently regarded the situation as being governed by Harry Hunter's readiness to accept a residuum of what, under his original contract, he was entitled to obtain, and not as one governed by the question whether a sale of that residuum, so different in character and quality from the original sale, was one within the powers or authority of the Bank as mortgagees. I do not say, that if otherwise authorized such a sale would have been necessarily void as against the appellant. But I do suggest, that even if it had been authorized by the memorandum of charge it was a sale which at the best could only be established against the appellant after it had, in the matter of price, been justified by the respondents on an opportunity accorded to them for that purpose. See, on this point, *Farrar* v. *Farrars, Ld.* (1)

LORD ATKIN. (2) My Lords, I have had the opportunity of reading the opinions already delivered and those about to be delivered by your Lordships, and add a few words of my own, as we are differing from the judgment of the Court of Appeal. On the first point whether demand had been made so as to bring into force the power of sale the inclination of my own opinion is that the original demand made on October 9, 1930, which it was not disputed was sufficient to bring into play both the obligation to pay under the

(1) 40 Ch. D. 395, 410.

(2) The opinion of Lord Atkin was read by Lord Macmillan.

guarantees and the power of sale under the memorandum of deposit, continued to be effective. I should have thought that the further deposit of shares in November, 1930, was merely a condition for an agreed extension of time for three months and the mortgage on April 18, 1931, a grant of extension of time for the six months therein mentioned; and that in any case clause 6 preserved the situation if in fact the demand still was effective. However, as the rest of your Lordships take a different view I cannot say that my own opinion is sufficiently strong to justify me in dissenting.

I found my own decision, however, on the grounds stated by the Lord Chancellor on the second point. The effect of article 17 in my opinion is to provide the means and the only means by which a member of the company can form an agreement for the sale of shares, which can only be constituted by the act of the secretary as agent for seller and purchaser declaring a contract to be concluded at the price fixed by the auditor. That was not done in this case, and in my opinion no rights arose between the Bank and Harry Hunter under any contract of sale either equitable or legal. But in any case the power of sale over the deposited shares did not in my judgment include a power to sell or agree to sell the whole equitable interest in the shares. The mortgage it is true is an equitable mortgage but of the whole legal interest. It seems to me to be without principle or precedent to construe a power of sale in such cases as including a power to agree to sell either the whole or part of the mortgagor's equitable interest divested of the legal title. Immense confusion might be occasioned in banking and financial transactions if such dispositions were held to be contemplated by the ordinary power of sale. The case of the mortgage of an equitable interest in property is of course quite different.

I am satisfied that Bennett J. was justified in the reasons of his judgment and in ordering that the register be rectified by striking out the names of the Bank's nominees and restoring the name of Samuel Hunter. The formal order should have followed this direction and not merely stated that Samuel Hunter's name be inserted "in lieu of" the names of the nominees. The judgment of the learned judge, however, makes it clear that the names were wrongfully on the register ab initio, and that the effect of the judgment is that Samuel Hunter's name is restored as though it had never been off the register. I agree with the motion proposed.

LORD RUSSELL OF KILLOWEN. My Lords, I agree with the view that this appeal should be allowed and that the order made by Bennett J. should be restored: but I do so upon the ground that when the Bank's nominee purported to sell and transfer the 1146 shares to Harry Hunter, in pursuance of the contract which the Company's secretary declared on December 19, 1931, to be concluded, the Bank had not, in my opinion, any power to sell the shares.

This point, which was raised and argued in the Courts below, was dealt with summarily by the trial judge in these words: "In my judgment there is no foundation for the argument and I hold that the Bank were in a position to realize their security at all times after October 9, 1930." While this gives no indication of the learned judge's reasons, the grounds upon which the members of the Court of Appeal took the same view are stated. Romer L.J. considered only the effect of the mortgage of April 15, 1931, and held that that transaction could not have put an end to the power of sale, because clause 6 of the mortgage deed expressly provided that it should not operate to prejudice or affect any right or remedy of the Bank under any security. Maugham L.J. did not think it necessary to add anything to what Romer L.J. had said on the point. The Master of the Rolls agreed with Romer L.J. The question whether there was any power of sale in existence immediately before the execution of the mortgage of April 15, 1931, was not considered. In my opinion there was not, and if that view is right, then clause 6 is of no avail.

The view which I take of what happened after the demand of October 9, 1930, had been made, is as follows: The Bank had made a demand for immediate payment by the plaintiff. He countered that demand with the suggestion (in his letter of October 29, 1930), that, instead of requiring payment (for which if they insisted on it he would need time), they should grant an overdraft limit for twelve months, and he asked "what security they required for this loan." To that the Bank replied that while requiring payment without further delay, if it was desired to stave off the receivership under the Cawthra Company's debentures, they required additional security to the extent of 5000*l.*, and registration of the Hunter shares in the names of the Bank's nominees. I can only read that as a statement by the Bank that they would be willing to accept further security in lieu of immediate payment by the plaintiff, for although reference is made only to the receivership it is to me inconceivable that the Bank, having obtained the additional security, could then have either sued the plaintiff on his guarantees or have proceeded to sell any of the securities.

After an interview on November 6, 1930, the Bank accepted further security in the shape of 346 shares in Thomas Hunter, Ld., but they reduced the period of twelve months to a period of three months.

The result of all this was that the Bank must be taken to have withdrawn or cancelled their demand for immediate payment, and to have substituted for that demand a different demand—namely, a demand for further security; with the consequence that, the further security having been given and accepted as satisfactory, there was no default by the plaintiff in complying with that demand. In other words, the condition precedent to the existence of the power of sale was never fulfilled.

It was contended by the respondents that fresh demands for payment were made by the Bank in the letters of October 22, 1931, and November 10, 1931. I find it impossible to construe either of those letters as a demand for payment. The first is a request to the plaintiff that he himself should realize his shares and his reversionary interest; the second is a statement of an intention of the Bank themselves to realize them.

Upon the ground, therefore, that upon the particular facts

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of this case, there was no power of sale in existence, I would allow this appeal.

I desire, however, to add a few observations on some other points. As at present advised I do not feel convinced that the entry on the register of persons who are transferees under a transfer not authorized by article 17 is necessarily a nullity, or that those persons who have in fact agreed to become members and are in fact entered on the register (see s. 25 of the Companies Act, 1929) are not while on the register members for all purposes, including the giving of a notice of intention to sell under article 17 (*a*). Further I feel some difficulty about the precise effect of the rectification orders which have been made, in view of the fact that they are not expressly stated to be retrospective in their operation. But it is unnecessary to express any decided opinion upon these points.

Neither am I able to justify to myself the way in which the Court of Appeal have upheld what purported to be a sale of the legal and equitable interest in the shares at the restricted price enforced by the articles (and necessarily at that price) as a sale of the equitable interest only which, if permissible, would not be in any way subject to those restrictions, but open to free competition. I confess that I am not sorry that the plaintiff in this case should still have an opportunity of redeeming his shares. The auditors, I doubt not, acted in good faith in fixing 13*l*. 6*s*. 8*d*. as the price, and that price must, therefore, in accordance with article 17 be "deemed to be the fair price." But I have an uneasy feeling, that a premium of 3*l*. 6*s*. 8*d*. on a 10*l*. share, upon which the dividends and bonuses during the eight preceding years had averaged 13¾ per cent., is a premium of unduly modest dimensions.

LORD MACMILLAN. My Lords, I concur in the opinion of the Lord Chancellor.

Ordered and adjudged that the order of the Court of Appeal of April 19, 1934, *in part complained of in the original and cross-appeals be reversed* *and that the judgment of Bennett J. of February* 23, 1934, *be varied by omitting the words "for three calendar months from the date of this judgment" and substituting therefor the words "before the 27th day of April,* 1936," *and that subject to such variation the said judgment of Bennett J. of February* 23, 1934, *be restored: Further Ordered that the petition and cross-appeal be dismissed: Further Ordered that Thomas Henry Victor Hunter, Lloyds Bank Ld., Joseph Lyford, Thomas Hunter, Ld., Cecil Heane Lindop and William Robert Smith do pay to the said Samuel Arthur Hunter the costs incurred by him in the Court of Appeal and also the costs incurred by him in respect of the original and cross-appeals to this House: Further Ordered that the Cause be remitted back to the Chancery Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.*

Lords' Journals, Jan. 27, 1936.

Solicitors for appellant: *Peacock & Goddard, for Shakespeare & Vernon, Birmingham.*

Solicitors for respondents T. H. V. Hunter and T. Hunter, Ld.: *G. H. Drury.*

Solicitors for respondents Lloyds Bank Ld. and their nominees: *Linklaters & Paines.*

[HOUSE OF LORDS.]

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THE RAILWAY ASSESSMENT AUTHORITY . . . . APPELLANTS;

AND

THE SOUTHERN RAILWAY COMPANY RESPONDENTS.

THE LONDON COUNTY COUNCIL, THE COUNTY VALUATION COMMITTEE FOR THE COUNTY OF MIDDLESEX, THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF CROYDON AND THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF BRIGHTON . APPELLANTS;

AND

THE SOUTHERN RAILWAY COMPANY AND THE RAILWAY ASSESSMENT AUTHORITY . . . . RESPONDENTS.

Rates and Rating—Railway—Net annual value—Method of ascertaining —Profits basis—Railways (*Valuation for Rating*) *Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 4, *sub-ss.* 1, 2.

The Railways (Valuation for Rating) Act, 1930, does not by s. 4, sub-ss. 1 and 2, preclude the application of the profits basis as a means of ascertaining the net annual value of a railway company's undertaking.

The House declined to express a final opinion on the effect of their Lordships' decision upon *London Midland and Scottish Ry. Co.* v. *Assessor of Railways and Canals, Scotland*, 1933 S. C. 590.

APPEALS from orders of the Railway and Canal Commission.

By s. 4, sub-s. 1, of the Railways (Valuation for Rating) Act, 1930 (hereinafter called "the Act of 1930"): "Where a railway company's undertaking is carried on in England . . . . the net annual value of the undertaking as a whole shall . . . . be determined in accordance with the following provisions. . . . . The Railway Assessment Authority shall—

* *Present:* VISCOUNT HAILSHAM L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MAUGHAM, and LORD ROCHE.

(*a*) ascertain, in the case of the first railway valuation roll, the average net receipts of the company for the accounting years 1928 and 1929, and, in the case of each subsequent roll, the average net receipts of the company for the first five of the six accounting years next preceding the year in which the roll is to come into force ; and

(*b*) estimate by reference to the average net receipts ascertained as aforesaid the rent at which the hereditaments occupied by the company might reasonably be expected to let as a whole from year to year, if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge (if any) and to bear the cost of the repairs and insurance and other expenses (if any) necessary to maintain the hereditaments in a state to command that rent ;

and the annual value so estimated shall . . . . be deemed to be the net annual value of the company's undertaking as a whole."

By sub-s. 2 : "In estimating . . . . the rent at which the railway hereditaments occupied by a company might reasonably be expected to let as a whole, the Railway Assessment Authority and any Court before which any determination of the Authority is under appeal shall not be bound to give effect to any custom or practice affecting the valuation of railway hereditaments which obtained prior to the passing of this Act in regard to the deduction or allowance to be made in respect of the capital of a tenant, but shall have regard to all relevant circumstances and all material considerations with a view to securing that such estimated rent shall represent a fair and just division of the net receipts as between landlord and tenant."

Acting in pursuance of this statute, the Railway Assessment Authority, the appellants in the first appeal, ascertained the average net receipts of the Southern Railway Company for the accounting years 1928 and 1929, computing them at the figure of 5,408,000*l.* The correctness of this figure was not disputed. The question was, what was the net annual value of the Railway Company's undertaking as a whole by reference to that figure ?

The Assessment Authority assessed the net annual value at

2,180,000*l.* The Southern Railway Company appealed from this assessment as being too high. The London County Council and the Corporations of Croydon and Brighton and the Valuation Committee for the County of Middlesex also appealed. They contended that the assessment was too low. The appeals were heard by the Railway and Canal Commission. That Court allowed the appeal of the Southern Railway Company and assessed the net annual value of the company's undertaking at 1,077,131*l.* and dismissed the appeals of the Local Authorities. They held that it was right and proper in the circumstances to apply to the ascertainment of the net annual value of the Railway Company's undertaking as a whole the method known as " the profits basis."

That method may be stated thus : From the gross receipts of the undertaking are deducted the expenses of earning those receipts, the balance representing the net receipts of the undertaking. From the net receipts so ascertained is deducted the tenant's share representing what the hypothetical tenant might reasonably be satisfied with for his profit, which includes interest on the capital which he will have to provide, remuneration for his industry, and compensation for risk. The residue represents the rent which he would be willing to pay for the undertaking, and is the net annual value thereof. (1)

The Railway Assessment Authority and the Local Authorities appealed to this House. The Southern Railway Company were respondents in both appeals. In the second appeal the Railway Assessment Committee were also respondents. The main question raised was whether the Railway and Canal Commission were right in applying the " profits basis " as the method of ascertaining the net annual value of the Railway Company's undertaking, the appellants contending that the Court was wrong in so doing.

1935. Nov. 18. *Sir William Jowitt K.C.*, *Sir Stafford Cripps K.C.*, and *Erskine Simes* for the Railway Assessment Authority.

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(1) See per Lord Cave L.C. *Metropolitan Water Board* v. *Kingston Union* [1926] A. C. 331, 338.

D. N. Pritt K.C., *Sydney Turner K.C.*, and *Michael Rowe* for the Local Authorities.

Since the passing of the Railways Act, 1921 (11 & 12 Geo. 5, c. 55), which assembled the principal railway companies into four large companies, of which the respondent Company is one, the "profits basis" has ceased to be an appropriate method of arriving at the net annual value of a railway undertaking. By that Act the Railway Rates Tribunal was established and entrusted with the duty of fixing the charges which the four great companies may impose.

The Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), was passed to simplify and amend the law with respect to the making and collection of rates. It defined, in s. 22, sub-s. 1 (*b*), the net annual value of a hereditament for rating purposes as "the rent at which the hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge, if any, and to bear the cost of repairs and insurance and other expenses, if any, necessary to maintain the hereditament in a state to command the rent."

In 1928 the Rating and Valuation (Apportionment) Act (18 & 19 Geo. 5, c. 44) was passed, which affected the rating of various hereditaments including those defined as "Freight-Transport Hereditaments," i.e., hereditaments occupied and used for the purposes of transport by railway as part of the undertaking of a railway company. The Local Government Act, 1929 (19 & 20 Geo. 5, c. 17), by s. 68, reduced the rateable value of freight-transport hereditaments to one-quarter of their net annual value and provided that the amount by which the rates were reduced should be paid into a fund to be applied towards reducing the charges for the transport of certain goods.

Lastly, the Railways (Valuation for Rating) Act, 1930 (20 & 21 Geo. 5, c. 24), provides by s. 1, sub-s. 1, that the provisions of the Rating and Valuation Acts relating to the ascertainment of the values of hereditaments shall cease to apply in the case of railway hereditaments in England occupied by a railway company to which the Act applies, and that the values for rating purposes of such hereditaments shall be ascertained as directed by the Act. By s. 2 the Railway Assessment Authority is constituted. By s. 4, sub-ss. 1 and 2, the method to be applied is indicated and it is provided that it shall no longer be necessary to give effect to any practice in regard to the allowance to be made in respect of the capital of a tenant, but that regard shall be had "to all relevant circumstances and all material considerations with a view to securing that such estimated rent shall represent a just and fair division of the net receipts as between landlord and tenant."

Never before the passing of this Act was the rating of railway undertakings based on the average net receipts of the whole undertaking. A separate valuation had to be made of the hereditament or hereditaments which lay within each parish. The running lines and any other directly productive works in each parish were valued upon a system known as the "profits basis." The gross receipts from traffic carried over the lines so far as they lay within the parish were computed: from them were deducted (1.) the working expenses for the parish; (2.) the rates upon the directly productive portion of the line within the parish. The stations and other indirectly productive works were valued on what was known as the "contractor's basis," i.e., a percentage on the capital value of those works equal to the return which a contractor would expect to get from investing his capital in land and buildings. When a further deduction, namely, (3.) a sum representing the parish's lot or share of the gross rental of the indirectly productive works over the whole system, had been made from the gross receipts from traffic carried over the lines so far as they lay within the parish, the balance was regarded as the net receipts of the directly productive works in the parish. By the recent legislation this cumbrous proceeding has been abolished, and with it the profits basis as a means of arriving at the rateable value of a railway undertaking has been superseded. The Assessment Authority is no longer bound to apply that basis. The object of the Authority must be to secure that the estimated rent shall represent a just and fair division of the net receipts as between landlord and tenant. The profits basis does not secure this. Its effect is to give the tenant a first charge on the receipts of the Company, which, considering the amount of capital invested in the railways, is an unfair preference of the tenant, and might lead to the landlord's share of the receipts being nothing; moreover its exclusive use would eliminate the contractor's basis as an auxiliary in the process of arriving at the rateable value of the hereditaments of a railway company.

Nov. 22. *Tyldesley Jones K.C.*, *Walter Monckton K.C.*, *A. M. Trustram Eve K.C.*, and *Alfred Tylor* for the Southern Railway Company. Much of the argument for the appellants falls to the ground when it is realized that the Railways (Valuation for Rating) Act, 1930, does not forbid the application of the profits basis as a means of arriving at the net annual value of a railway hereditament. On the contrary, if that method leads to "a just and fair division of the net receipts as between landlord and tenant," so far from being forbidden, it is approved and commended. Therefore the real question in these appeals is whether the profits basis does lead to a just and fair division of the net profits as between landlord and tenant. The question admits of one answer, and only one. For eighty years or more the profits basis has been applied to the rating of waterworks, docks, railways, gas companies and other public undertakings where the premises of the public bodies extend into several parishes, as being not only a method, but the method in most cases to be applied in arriving at a just and fair division of the receipts of the undertaking between the landlord and the hypothetical tenant of the hereditament in question: *Reg.* v. *Grand Junction Ry. Co.* (1); *Reg.* v. *Mile End Old Town Overseers* (2); *Reg.* v. *West Middlesex Waterworks Co.* (3); *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (4); *London County Council* v. *Churchwardens, &c., of Parish of Erith and Assessment Committee of Dartford Union* (5); *Port of London*

(1) (1844) 4 Q. B. 18.
(2) (1847) 10 Q. B. 208.
(3) (1859) 1 E. & E. 716.
(4) (1863) 4 B. & S. 135.
(5) [1893] A. C. 562.

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Authority v. *Assessment Committee of Orsett Union* (1); *Metropolitan Water Board* v. *Kingston Union* (2); *St. James' and Pall Mall Electric Light Co.* v. *Westminster Assessment Committee.* (3)

Nov. 28. *Pritt K.C.* replied for the London County Council and other Local Authorities.

Sir William Jowitt K.C. replied for the Railway Assessment Authority.

Nov. 29. The House took time for consideration.

1936. Jan. 24. VISCOUNT HAILSHAM L.C. My Lords, there are before you two appeals, one by the Railway Assessment Authority and the other by certain Local Authorities, from an order of the Court of the Railway and Canal Commission dated February 6, 1935, allowing an appeal by the Southern Railway Company from the determination and certificate of the appellants, the Railway Assessment Authority, determining the net annual value of the undertaking of the respondent Company as a whole for rating purposes to be the sum of 2,180,000*l.* The Commissioners, allowing the appeal of the respondent Company, directed the appellants to substitute for that sum the sum of 1,077,131*l.* as the net annual value of the undertaking of the Railway Company for rating purposes. There is an appeal direct to this House by the joint effect of the Railway and Canal Traffic Act, 1888 (as amended), and of s. 9, sub-s. 4, of the Railways (Valuation for Rating) Act, 1930, but only on questions of law, the decision of the Commissioners on questions of fact being final. The Railway Assessment Authority, not being interested parties, appeared before your Lordships mainly for the purpose of obtaining directions from this House which would guide them in the performance of their difficult and important duties under the Act of 1930. The London County Council and other Local Authorities were of course interested in supporting the decision of the Railway Assessment Authority, or at least of obtaining a decision which might enable them to secure from the

(1) [1920] A. C. 273.
(2) [1926] A. C. 331.
(3) [1934] A. C. 33, 41.

Commissioners the fixing of a higher figure than 1,077,131*l.* The interested appellants did not present arguments precisely on the same lines as those put forward by the Railway Assessment Authority; but your Lordships have had the advantage of hearing a full and able discussion of the problems arising in connection with the rating of railways under the Act of 1930 so far as questions of law are concerned, and have been enabled to arrive at your opinions on them.

Although the actual points for decision turn mainly, if not entirely, upon the construction to be placed on certain sections of the Railways (Valuation for Rating) Act, 1930, all parties were agreed that in order to reach a proper conclusion on the questions at issue, it was essential to bear in mind the law with regard to the rating of railways as it stood at the date of the passing of the Act. Accordingly, before turning to the language of the Act, I propose to state shortly what I apprehend to be the legal position as it then was.

The foundation of our rating law is the Poor Relief Act of 1601, which imposed liability on the inhabitants and occupiers of every parish to contribute to the relief of the poor in that parish. It was early established that the contributions were to be levied according to the value of holdings in the parish; and, after some diversity of practice, Parliament enacted that the liability should rest only on the occupiers of rateable hereditaments and not on inhabitants in respect of their personalty. In 1836 the Parochial Assessment Act of that year provided, by s. 1, that the rate was to be based "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." Substantially the same language is used in the Parochial Assessment Act, 1862, and in the Valuation of Property Metropolis Act, 1869, with regard to London. My Lords, this method of assessing liability for rates was no

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doubt very suitable for the simple conditions which prevailed in the reign of Queen Elizabeth ; but when it was sought to apply it to modern conditions, and especially to the assessment of great public utility undertakings, such as railways, waterworks, gasworks and the like, whose operations might easily extend over great areas, stretching far beyond the limits of any individual parish, the greatest difficulty was found in adapting the statutory provisions to the facts of such a case. The Courts, more than once, appealed to the Legislature to relieve them from the burden thus cast upon them ; see, for example, the judgment of Lord Campbell in *Reg.* v. *Great Western Ry. Co.* (1) and the judgment of Wightman J. in *Reg.* v. *West Middlesex Waterworks Co.* (2) Unfortunately, the Legislature did not see its way to intervene and the Courts were compelled to evolve a system of calculation, with the assistance of the expert advisers to the rating authorities and to the undertakings, which involved a number of very difficult assumptions, but which received the approval of your Lordships' House on a number of occasions, and which became recognized as the standard method of assessing the rateable value of hereditaments in these cases. So far as the railways were concerned, the method adopted was to divide the undertaking into those portions which were regarded as directly productive of profit, such as the permanent way, and those portions which were regarded as only indirectly productive, such as stations and other hereditaments of that kind. The latter were usually valued by taking the cost of erection and allowing a percentage upon that cost, on the theory that the companies would not have erected them unless they had regarded them as worth at least a fair average rate of interest upon the money invested in their construction. This method was commonly described as the " contractor's basis." So far as the directly productive portions of the undertaking were concerned, it is obvious that, if the permanent way was treated as an isolated entity without continuation at either end of the parish, its rateable value would be practically nothing ; on the other hand, if it were regarded as a vital link between lines

(1) (1851) 15 Q. B. 379, 396, 397.

(2) 1 E. & E. 716, 728.

existing up to the borders of the parish, its value would be very great indeed. The former method would have been plainly unjust to the rating authorities; the latter would have been equally unjust to the companies. The method of assessment of the rateable value which was in fact adopted was the method which was commonly described as the "profits basis."

In order to apply the profits basis, the calculation commenced by ascertaining the gross receipts earned in the parish for the latest period prior to the date of the rate. It was held improper to take the total gross receipts of the whole system and to allocate them to the parish according to mileage: *Reg.* v. *London, Brighton and South Coast Ry. Co.* (1) From the gross receipts earned in the parish, a proper proportion of the working expenses throughout the system had to be deducted and a deduction had further to be made for the portion allocated to the parish of rent hypothetically paid for the use of stations and other indirectly productive assets, and for the rates payable in respect thereof. The amount remaining after making these deductions from the gross receipts earned in the parish was taken as the net profit divisible between the owner and the hypothetical tenant. Since the hypothetical tenant was only rateable in respect of hereditaments which he was supposed to occupy, it was necessary to make a fair deduction for the use of his personalty and stock-in-trade; the method adopted was to estimate the amount of capital required to work the whole system, to calculate a fair proportion of this amount as being fairly allocated to the particular parish and to allow the deduction of a certain percentage on the capital so ascertained from the amount of the divisible net profit. The percentage to be allowed on this capital was fixed at a sum considered to be sufficient to give the tenant interest upon his money and a fair return on his capital for the risks which he undertook and by way of profit on his adventure. The portion of the net profits which remained after this deduction was regarded as the rent which the hypothetical tenant would be prepared to pay, deducting of course the statutory allowances thereon, in order to arrive at the true rateable value. It is not known

(1) (1851) 15 Q. B. 313.

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who first applied this system, but it certainly was in common use by the middle of last century, and it was the system invariably adopted from that time until the outbreak of the Great War.

When the War broke out, the Government took over the control of all the railway systems in the country and, since there was no allocation of the receipts between the different railways, it was impossible to continue to apply this method. Accordingly, during the period of the War, the rates were adjusted by arrangement between rating authorities and the railway companies by agreement and not fixed on any precise basis. After the termination of the War, there was passed the Railways Act, 1921, which received the Royal Assent on August 19 in that year. By that Act, the principal railway companies in England and Scotland were amalgamated into four large units, of which the respondent Company is one. The Act set up a Railway Rates Tribunal, which was charged with the duty of fixing the railway charges to be exacted by the different companies. The charges were to be assessed on such a basis as would, in the opinion of the Tribunal, ensure to each of the companies, with efficient and economical working and management, an annual net revenue equivalent to the net revenue of their constituent companies in the year 1913, together with proper allowances in respect of additional capital since invested. And the old system under which the railways were allowed to fix their charges, provided that they did not exceed certain maximum rates and did not give an undue preference to individual traders, was abolished.

In 1925 the Rating and Valuation Act of that year was passed in order to simplify and amend the law with regard to the making of rates generally. That statute, by s. 22, sub-s. 1 (*b*), defined the net annual value for rating purposes to be the rent at which the hereditaments might reasonably be expected to let from year to year, if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge, if any, and to bear the cost of repairs and insurance and other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

In 1928 the Rating and Valuation (Apportionment) Act of that year was passed, which defined what it described as "freight-transport hereditaments" as including (inter alia) hereditaments occupied and used wholly or partly for railway transport purposes as part of a railway undertaking carried on by such a company as the respondent Company. And the Local Government Act, 1929, by s. 68, reduced the rateable value of freight-transport hereditaments to one-quarter of the net annual value thereof and went on to make provisions, in the eleventh schedule, for the creation of a fund into which the rate relief so afforded should be paid by each railway company and should be administered substantially in the reduction of charges on certain selected traffics.

From this very brief summary, it will be seen that, after the War, a number of important changes had been made affecting the economic position of railway companies. I have thought it right to give such a brief summary of the nature of those changes, since it was argued by the appellants that the existence of these Acts of Parliament and their effect were relevant in order properly to construe the provisions of the Railways (Valuation for Rating) Act, 1930. There is no doubt that the changes to which I have called attention do affect or tend to affect the average net receipts of any railway company, both by reducing competition and by altering the basis of charges and by giving certain relief in respect of rates, which has to be applied for the benefit of the selected traffics; in that sense they are certainly relevant circumstances which the Railway Assessment Authority must take into account in estimating the rent at which the railway hereditaments might reasonably be expected to let as a whole; but I am unable to appreciate why the existence of these Acts should be relevant to affect the construction of the language used in the Act of 1930. In my opinion the Court was right in disregarding them for that purpose.

It is to the consideration of the language of that Act of Parliament that I now turn. The Railways (Valuation for Rating) Act, 1930, began by providing, in s. 1, that the provisions of the Rating and Valuation Acts relating to the ascertainment of the values of hereditaments should cease to apply in the case of railway hereditaments in England occupied by a railway company to which the Act applies, which admittedly includes the respondent Company. And it enacted that the values for rating purposes of all such hereditaments should be the values thereof as ascertained in accordance with the provisions of the Act.

I pause here to say that there are other provisions to be found in the Act relating to railways whose undertakings are carried on partly in Scotland, but we are here concerned with a company the whole of whose railway undertaking is in England. Your Lordships' attention was called to a judgment of the Court of Session on the construction of this statute as it applied to Scotland, and it was stated that there was no material difference between the provisions with regard to Scotland and those relating to England. I do not desire to pronounce finally on the correctness of that decision. It is sufficient to say that the language of the sections is not identical and that the rating system and practice of the two countries, before the passing of the statute, was very different. No doubt the effect of your Lordships' judgment in this case upon the views expressed in *London Midland and Scottish Ry. Co.* v. *Assessor of Railways and Canals, Scotland* (1), will be fully considered in any case which comes up for decision hereafter in Scotland. It is not necessary or desirable to attempt to determine that question to-day.

Under s. 2, the Railway Assessment Authority is constituted ; by s. 3, provision is made for the preparation of a Railway Valuation Roll to come into force on the appointed day and provision is further made for quinquennial revisions of the Valuation Roll. By s. 3, sub-s. 3, the Railway Assessment Authority is required to determine the net annual value of the undertaking of a railway company as a whole, to apportion the net annual value so determined among all the railway hereditaments in England occupied by that railway company, and to calculate the rateable value of every such hereditament by reference to the net annual value so apportioned to it. Sect. 4 contains the provisions in accordance

(1) 1933 S. C. 590.

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with which the net annual value is to be ascertained—and it is on the language of this section that the main controversy turns in the present case.

By that section the Railway Assessment Authority is required to ascertain in the first instance the average net receipts of the company for the accounting years 1928 and 1929; that figure has been ascertained in the present case at 5,408,000*l.*, and no dispute arises with regard to it. By s. 4, sub-s. 1 (*b*), the Railway Assessment Authority shall then "estimate by reference to the average net receipts ascertained as aforesaid the rent at which the railway hereditaments occupied by the company might reasonably be expected to let as a whole from year to year, if the tenant undertook to pay all usual tenant's rates and taxes and tithe rentcharge (if any) and to bear the cost of the repairs and insurance and other expenses (if any) necessary to maintain the hereditaments in a state to command that rent;" and the sub-section goes on to provide "The annual rent so estimated shall, for the purposes of this Act, be deemed to be the net annual value of the company's undertaking as a whole."

Pausing there for a moment, your Lordships will not fail to notice the identity of the language used in this sub-section with what had been the law ever since the Parochial Assessment Act of 1836 and what has been the basis applicable to railway rating for the last hundred years; and indeed it was not seriously disputed by the appellants that, if that sub-section had stood alone, the construction placed upon the Act by the Railway and Canal Commission could not have been impeached. The only substantial difference from the old system is the provision that the annual value of the whole undertaking shall be ascertained as a whole and shall then be apportioned between the different parishes, instead of attempting to ascertain the earning capacity of each part of the railway line lying within a particular parish, as was done in pre-war days. The new method also does away with the necessity of drawing a distinction between directly and indirectly productive parts of the undertaking and calculating the rateable value of the indirectly productive parts of the undertaking in each parish upon the "contractor's basis." But what has to be ascertained still remains the rent at which the hereditaments might reasonably be expected to let from year to year on the terms set out in the Act.

But the sub-section which I have quoted is followed immediately by sub-s. 2, and it is on the language of that sub-section that the appellants mainly rely. I think therefore that it is useful to quote its exact language. Sect. 4, sub-s. 2, provides that: "In estimating for the purposes of this section the rent at which the railway hereditaments occupied by a company might reasonably be expected to let as a whole, the Railway Assessment Authority and any Court before which any determination of the Authority is under appeal shall not be bound to give effect to any custom or practice affecting the valuation of railway hereditaments which obtained prior to the passing of this Act in regard to the deduction or allowance to be made in respect of the capital of a tenant, but shall have regard to all relevant circumstances and all material considerations with a view to securing that such estimated rent shall represent a fair and just division of the net receipts as between landlord and tenant."

Basing themselves on these words and particularly on the direction that the estimated rent is to "represent a fair and just division of the net receipts," the appellants contend that the Act has put an end to the old system of calculating the amount of the capital required by a tenant for the working of the undertaking and allowing him a percentage thereon, and that it is now necessary to follow some other method. In particular it is urged that the hypothetical landlord is entitled, having regard to the large amount of capital which has been expended by him in creating the railway company's undertaking, to some proportion of the net receipts obtained either by a comparison of the landlord's capital and of the tenant's capital, or by allowing the rent at which the railway hereditaments might reasonably be expected to let as a whole from year to year to be influenced and presumably increased by a consideration of the large amount of capital expended in creating the immovable parts of the undertaking.

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I can see no ground for any such conclusion. In the first place it may be observed that the second part of the sub-section beginning with the words "but shall have regard" seems naturally to indicate that there is an antithesis between the considerations to which the Authority is not bound to give effect, and the new rule that all relevant circumstances and material considerations, with a view to securing that the estimated rent represents a fair and just division of the net receipts as between landlord and tenant, shall be borne in mind.

What however is more important is the circumstance that the only custom or practice which the Authority is declared to be at liberty to depart from is a custom or practice "in regard to the deduction or allowance to be made in respect of the capital of a tenant." It is thus beyond question that the Legislature contemplates that there will be a deduction or allowance in respect of the tenant's capital, and, having regard to the universal practice which obtained before the Act came into force of making such a deduction or allowance in the shape of a percentage upon the tenant's capital, it is in my opinion clear that the section in no way directs the Authority to depart from this method and to adopt some other method which is left wholly undefined. It is not in dispute that it is essential in some way to exclude the profits earned by the hypothetical tenant's rolling stock, plant, and other implements, and your Lordships were not informed of any clear and satisfactory method of doing this except by means of a percentage on the capital employed in providing such chattels. The appellants laid especial stress on the concluding words of the sub-section. They contend that the reference to a fair and just division of the net receipts shows that the old method of ascertaining the rent which the tenant is prepared to pay, must be abandoned, since that basis of calculation provides for the tenant receiving his share of the net receipts before the landlord gets anything and might, in some cases, involve the landlord getting nothing; and they point out that the conception of a division of the net receipts is inconsistent with the ordinary relationship of landlord and tenant.

My Lords, I am quite unable to accept this argument. It is true that the expression "division of the net receipts" is not a very happy phrase to describe the deduction from the net receipts of the amount necessary to induce the hypothetical tenant to embark upon the enterprise, but I see no justification in that fact for altering the conception of the relationship of landlord and tenant to a conception of joint adventurers, an alteration which is really involved in the appellants' argument. The explanation for the use of the word "division" is probably to be found in the fact that it was the usual expression in rating law at the date of the Act, and that, if the amount which the tenant would require in order to induce him to take and operate the hereditaments is properly ascertained and deducted from the total net receipts, the result is to divide the net receipts fairly and justly between landlord and tenant, even though, in an extreme case, the landlord's share might be nothing at all. It is the rent which is to be estimated in such a way as to represent a fair and just division, and it is evident that the rent and nothing else is to be the landlord's share. When this is ascertained, the balance is the tenant's share of the net receipts. The "division" therefore is not to be an aliquot division on some unspecified basis, but is to be the result of a process involving the ascertainment of the landlord's share in the form of rent.

My Lords, I am not prepared to say that there are no circumstances in which the profits basis, as it has been previously applied, would be inappropriate, or that under no circumstances could any other method be adopted. I think that the more accurate way of stating the position is to say, as Lord Cave said in the *Kingston Union* case (1), that this method is the recognized one and is one which the Authority is justified in adopting as it has done in the present case; that it would need special circumstances to require the adoption of a different method and no such circumstances are to be found in the present case; and that the only alternatives put forward by the appellants are, in my judgment, plainly inadmissible. It follows that on the main point of

(1) [1926] A. C. 331.

construction I am of opinion that the decision reached by the Railway and Canal Commission Court was correct and I invite your Lordships to adopt that conclusion.

But in addition to this main point of construction, certain subsidiary questions were raised by the appellants in the course of argument, and it is desirable that this House should express an authoritative opinion upon them. In doing so, it is necessary to bear in mind the language of Lord Halsbury in the *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee.* (1) The then Lord Chancellor there points out (2) that the Legislature has imposed upon the Authority the obligation of solving a simple question of fact, that is to say, to form an estimate of the net annual value, and he goes on to say that they are to arrive at that value unfettered by any statute as to the way in which they can do it. " I am not aware of any rule of law or any statute which has limited them as to the mode in which they shall arrive at it. It is not a question of law at all—it is a question of fact. These questions have from time to time come before the Courts, and have been argued as questions of law ; but that is where, instead of doing what the statute has directed them to do, the overseers, or those who were acting on the part of the parish, have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included." I apprehend that it is only if we are satisfied that the Authority has gone wrong in one of these two ways that there is any power in your Lordships' House to interfere.

My Lords, it was also contended that even if the old and well established profits basis was the correct method to apply, it could be shown from the judgments under appeal that the Commissioners had misapplied the method, having regard to the positive terms of s. 4, sub-s. 2, of the Act. There is of course no doubt that the Railway Assessment Authority is free to disregard old customs and practices in regard to the deduction or allowance in respect of the capital of the tenant. Two illustrations are afforded by the judgments of the

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(1) [1901] A. C. 175, 180.

(2) Ibid. 179, 180.

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Commissioners, first, the old practice in regard to the valuation of the rolling stock, and secondly, the old practice of adding to the cost of manufacture of rolling stock by a company in its own workshops a percentage supposed to represent the manufacturer's profit. These two points were decided against the Railway Company for the reasons clearly expressed in the judgment of MacKinnon J., and I need not add anything on those points. It is, however, asserted that the Commissioners, in fixing the hypothetical rent, misdirected themselves upon several other points. They determined in the result that the amount of the tenant's capital was 27,610,690*l.* and that 15 per cent. was a fair and proper percentage for interest, trading profit and risks. This amounted to 4,141,603*l.* To this was added 189,266*l.* as the tenant's share of receipts earned without the use of the tenant's rolling stock, making a total of 4,330,869*l.* Deducting this sum from the average net receipts (5,408,000*l.*) the amount of 1,077,131*l.* is reached as the net annual value of the Company's undertaking as a whole. The enormous effect of a slight alteration in the percentage allowed is evident, for 1 per cent. on 27,610,690*l.* is 276,106*l.*, and it was strongly urged that 15 per cent. on the tenant's capital was a percentage only arrived at by wrong views as to the principles on which the hypothetical rent is to be ascertained in the case of a railway, regard being had to the provisions of s. 4 of the Act of 1930.

My Lords, I am not satisfied that these contentions were made out ; but there are certain phrases in the judgments of the Commissioners which might be open to misconstruction, and having regard to the great importance of this case and others which may depend upon it, it is perhaps desirable to state as clearly as the case admits the principles upon which the hypothetical rent and the percentage on tenant's capital, which forms so important an element in fixing it, ought to be ascertained.

The definition requires an estimate of the sum which a hypothetical tenant might be expected to pay to a hypothetical landlord. It was well settled before the Act that it was necessary in estimating such a rent to take into account the owner of the hereditaments as a possible tenant: *Reg.* v. *School Board for London* (1); *London County Council* v. *Churchwardens, &c., of Parish of Erith and Assessment Committee of Dartford Union* (2); and, further, that the hypothetical tenant, though only a tenant from year to year, is supposed to have a reasonable prospect of continuing to be a tenant: *Reg.* v. *South Staffordshire Waterworks Co.* (3) There is no doubt that both these principles, if they may be so described, continue to be true.

A further general observation occurs to me and that is that one may be led astray in the case of a railway undertaking by attempting too detailed or elaborate a personification of the hypothetical tenant. In the case of an ordinary house a rating authority may well visualize an ordinary citizen with all the usual desires, tastes and avocations of mankind as the tenant who is to pay the rent; but when we come to a railway undertaking in which vast sums have been invested and in which the share of the tenant's capital amounts to many millions it is apparent that the effort to visualize an actual tenant involves an almost impossible strain. In my opinion it would be a mistake to allow the percentage to be influenced by the largeness of the sum which the tenant is supposed to supply for capital, or by the difficulty of finding a tenant with such extensive means, or by the difficulty the tenant might find either in realizing his rolling stock and other chattels or in reinvesting so large an amount of capital on the expiration of his tenancy. Since the landlord is to be contemplated as a possible tenant, none of these considerations must be allowed to come in.

It was argued by the interested parties that the Tribunal were precluded from taking into account the actual results of any years, and that they were limited to a consideration of the average net receipts as directed by s. 4, sub-s. 1 (*a*). My Lords, I cannot accept that view. No doubt the figures upon which the calculation of rent is to be based are those which are ascertained in the terms of that sub-section; but

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(1) (1886) 17 Q. B. D. 738.
(2) [1893] A. C. 562.
(3) (1885) 16 Q. B. D. 359.

I think that the figures of individual years either forming part of the average, or preceding or following the standard years, are relevant as showing the tendency of the receipts to rise or fall, and therefore as an indication of the risk which the hypothetical tenant would have in mind when he was contemplating renting the premises. To take a convenient illustration which was given in the argument; supposing one company had had net receipts during a quinquennium of one, two, three, four and five million pounds respectively, and another company during the same period had had receipts of five, four, three, two and one million pounds respectively, the average net receipts of each company would be the same, but it seems preposterous to suppose that the hypothetical tenant would give as much rent for the hereditaments in the second case as he would in the first.

Another point which was urged was that the Authority had omitted to take into account the landlord's capital and it was pointed out that considerable sums had been recently spent which were not reflected in the net receipts of the standard years. Again it was urged that the rates in the standard years were paid at a much higher rate than those which would be payable by virtue of the Authority's decision. I think that these two factors would both be relevant elements to enter into the tenant's consideration when he was contemplating taking the hereditaments, and that their existence would be reflected in the percentage allowed to the tenant on his capital: but I am not satisfied that they have been ignored by the Court below from that point of view. They would rightly be excluded from the question of construction, to which I think they are quite irrelevant.

Then it was said that the Court had assumed that the hypothetical tenant might well be left at the end of the year with a huge amount of unrealizable rolling stock and that he would require very heavy compensation to make up for that risk. The respondents expressly disclaimed any such contention and no trace of it was to be found in the arguments below. I think it must be assumed that the hypothetical tenant would be able to realize his stock at the end of the year as easily as he could acquire it at the beginning of the year at the market value prevailing at the respective dates. There is a certain risk of fall in market value, just as there is the possibility of increase in market value, but he must not be given a higher percentage on the basis that he may be unable to sell the stock at all.

Then again, it was said that the Court below had proceeded on the hypothesis that the hypothetical tenant would have to assemble together from all over the country an adequate staff to manage and run the railway undertaking and that this was wrong in law. The contention was based upon a passage in the judgment of Sir Francis Taylor, where, after citing Lord Herschell's words in the *Erith* case, he goes on to say " vacant premises seem to me to be inconsistent with the presence of a highly trained staff and management." My Lords, it is this expression which has given me most trouble in the present case. If it were to be construed as bearing the meaning which the appellants allege, if your Lordships were to assume that the Court based their allowance for tenant's capital on the view that the tenant must be treated as somebody who came to take over this great railway system with no means of running it, with no directors or managers or staff, and that he had to be compensated for the risk which he ran of being unable to assemble such an organization in order to carry on his undertaking, then indeed I think the appellants would be right in saying that the calculation had proceeded upon a wrong basis. It must be assumed that there is in existence the present staff and management of the railway and that the tenant can reasonably expect to avail himself of their services. But I cannot believe that that is the true meaning to be placed upon the expression. The passage in the judgment begins by a reference to the contention on behalf of the Assessment Authority that the hypothetical tenant was to be treated as an investor in a very favourable concern with a staff specially provided for him, having to give neither skill nor judgment in the carrying on of the undertaking. I think that the observation of the learned Commissioner was directed to this contention, which is of course not well founded. A

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tenant is not to be regarded merely as an investor in railway shares and to be treated therefore as reasonably compensated by the ordinary rate of interest which can be obtained by such an investment. He is a person embarking upon a commercial undertaking in which he is to sink his capital, in which he takes all the risks of success or failure, and in which he has not merely to be compensated by receiving a reasonable interest upon the capital invested, but also to receive such a profit upon his venture as reasonably to compensate him for the risk which it involves and to induce him to embark upon its prosecution. How much that percentage ought to be is a question of fact which is for the Authority and not for your Lordships' House.

It was finally contended by the appellants that it could be shown mathematically from the accepted figures in the case that the Tribunal had not given effect to their own decision as to disallowing certain claims for obsolescence and for allowances for mass production. For the respondents this conclusion was vigorously contested. In my judgment, if such a mistake were made, it would be a pure error of calculation and not a question of law for your Lordships' House. By virtue of the Railway and Canal Commission Rules made in 1924, there is power to apply to the Commissioners to review and rescind or vary any decision or order previously made by them; that rule contains a time limit, but the respondents, while challenging the appellants' contentions upon the merits, agreed that they would not oppose any necessary extension of time. If the appellants think that they can make out that case, their right method is by proceeding under that rule.

It is desirable to add that, if on proper application the Court is asked to review and vary its decision under the rule above referred to, it is of course open to the Court to consider and review its assessment in the light of the decision of your Lordships' House. If upon such review the Court is of opinion, in respect of any of the matters arising out of the questions which I have described as subsidiary questions, that more weight ought to be given to considerations appearing from

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this decision than was given to them before the decision, the Court will have the opportunity to deal with the facts in the light of the decision, and, if on the facts it were proper or necessary to do so, to vary the figures fixed by its previous judgment and order. Your Lordships cannot interfere with the judgment of the Court unless you are satisfied that it did, in fact, proceed upon a wrong construction of the Act, or did either include something which was legally inadmissible, or exclude something to which it was legally bound to have regard. For myself, I am not satisfied that any such error was committed, and accordingly I move your Lordships that these appeals be dismissed with costs.

My Lords, I have to add that I have the concurrence of my noble and learned friends Lord Thankerton and Lord Maugham in the opinion which I have delivered.

LORD RUSSELL OF KILLOWEN. My Lords, I have had the opportunity of reading and considering the opinion which has just been delivered by the Lord Chancellor. I agree with it and desire to add nothing.

LORD ROCHE. My Lords, I also have had the opportunity of reading the opinion pronounced by the Lord Chancellor. I concur in the conclusions arrived at by him and announced in that opinion, and I have nothing to add.

Orders appealed from affirmed and appeals dismissed with costs.

Lords' Journals, Jan. 24, 1936.

Solicitors for the Railway Assessment Authority: *Torr & Co.*

Solicitors for the London County Council: *Sharpe, Pritchard & Co.*

Solicitor for the Southern Railway Company: *W. Bishop.*

[PRIVY COUNCIL.]

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BICKERSTETH (SINCE DECEASED) AND ANOTHER . . . . APPELLANTS;

AND

SHANU . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

Nigeria—Will—Devise of real estate to testator's son—To "take effect" upon his attaining the age of twenty-five years—Devise vested at testator's death—Not contingent on son attaining twenty-five—Rule of early vesting—To take effect in possession at twenty-five.

A testator by his will, drawn up in clauses in English form, appointed the appellants to be his executors and trustees, and by cl. 6 devised to his son certain real property consisting of a number of plots of land and the buildings thereon situated at Lagos. A separate clause at the end of cl. 6 stated that: "These devises shall take effect upon my said son attaining the age of twenty-five years." The testator died in 1918, and the son, on attaining the age of twenty-five years in 1930, brought an action against the appellants claiming an account as from the date of the testator's death of the rents of the properties devised to him by cl. 6 of the will.

Held, first, that the established rule for construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness.

Principle stated by Best C.J. in *Duffield* v. *Duffield* (1829) 3 Bligh N. S. 260, at p. 331; and by Warrington L.J. in *In re Blackwell. Blackwell* v. *Blackwell* [1926] 1 Ch. 223, at pp. 233–234, approved and applied.

Held, secondly, that on a consideration of the whole of the will and of the circumstances in which it was made, and applying the above-stated rule or principle, the words "shall take effect" related to the devise taking effect in possession, and were not intended to impose a condition precedent on the devise, which, therefore, was to be construed as vesting at the death of the testator, subject to divestment if the son should fail to attain the age of twenty-five years, and was not contingent on his attaining that age. The son was accordingly entitled to the rents claimed.

Judgment of the Supreme Court of Nigeria affirmed.

APPEAL (No. 97 of 1933) from a judgment of the Full Court of the Supreme Court of Nigeria (March 13, 1933), affirming a judgment of the Divisional Court (May 16, 1932).

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* *Present:* LORD ALNESS, LORD MAUGHAM, and SIR SIDNEY ROWLATT.

The appellants, Gabriel Togonu Bickersteth (since deceased) and Phillip Henryson Williams, were executors and trustees of the will of Joseph Robertson Shanu, who died on May 21, 1918, and by his will, dated November 2, 1917, devised by cl. 6 certain real estate to his son, Evan Adeleye Shanu, the respondent. At the end of cl. 6 was a separate clause providing that: "These devises shall take effect upon my said son attaining the age of twenty-five years." On his attaining twenty-five years of age, in March, 1930, the respondent brought an action against the appellants claiming an account of the rents of the properties devised to him from the date of the testator's death in May, 1918.

The question for determination was whether the devise vested at the death of the testator, subject to being divested if the respondent did not attain the age of twenty-five, or was contingent on the respondent attaining that age.

The facts, and the terms of cl. 6 of the will, appear from the judgment of the Judicial Committee.

The Divisional Court (Webber J.), after observing that "in cases of doubt there is always a presumption in favour of early vesting," held that the devise was vested at the death of the testator, subject to divestment, and that possession was deferred until the plaintiff (respondent) attained the age of twenty-five years.

An appeal to the Full Court of the Supreme Court of Nigeria (Kingdon C.J., Berkeley and Lloyd JJ.) was dismissed. Kingdon C.J., delivering the judgment, was of opinion that Webber J. had correctly stated that there was a presumption in favour of early vesting when, as in this case, there was a doubt as to the intention of the testator.

1936. Jan. 13. *Henry Johnston* for the appellants. On the true construction of the will the devise was contingent on the respondent attaining the age of twenty-five years.

[LORD ALNESS. The real question is, what is the true meaning and effect of the words "shall take effect"?]

[Sir Sidney Rowlatt. If the testator had been asked: "Do you want to be intestate until your son attains twenty-five?" what would he have said?]

He would have said "No"; but the words in the will that the devise is to take effect on the respondent attaining the age of twenty-five are perfectly unambiguous.

[Lord Alness. I can understand that the words "take effect" postulate a gift already given.]

[Lord Maugham. Where, for example, a gift is made to take effect at thirty, the notion is that the time is introduced simply for the purpose of postponing enjoyment.]

In *In re Wrightson. Battie-Wrightson* v. *Thomas* (1), which is an authority for the proposition that a devisee of real property under a devise which has vested, but which is liable to be divested, is entitled to possession of the rents, reference is made to *Duffield* v. *Duffield* (2), which lays down the general principles applicable. It is there stated (2) that all estates are to be held to be vested except those which the Court cannot treat as vested "without deciding in direct opposition to the terms of the will." There is that "direct opposition to the terms of the will" in this case. If the judgments below are right, the devisee would be entitled to possession immediately on the testator's death, and that is in direct opposition to the wording of the will. [Reference was made to Hawkins on Wills, 3rd ed., p. 282.] In *Phipps* v. *Ackers* (3) Tindal C.J. said (3): "In such a case Mr. Fearne may be right in the opinion found among his posthumous works, that until the devisee attains the prescribed age, he takes no interest whatever in the devised lands." *In re Blackwell. Blackwell* v. *Blackwell* (4) does not bring the present case within the rule in *Boraston's Case*. (5) If the words "take effect" were omitted, the devise would be, "to my son upon his attaining the age of twenty-five years," and that would clearly be contingent on his attaining that age: the inclusion of the words "take effect" cannot have a different effect.

(1) [1904] 2 Ch. 95.
(2) 3 Bligh N. S. 260, 331.
(3) (1842) 9 Cl. & F. 583, 590–591.
(4) [1926] 1 Ch. 223, 233, 231.
(5) (1587) 3 Rep. 19a.

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Topham K.C. and *Horace Freeman* for the respondent. Looking at the will apart from technical rules, what the testator was endeavouring to say, was: " I am devising certain property to my son, but he is not to have it in possession until a certain time." The rule on which the appellants rely, as stated by Best C.J. in *Duffield* v. *Duffield* (1), is a very strong one in favour of early vesting rather than a contingent gift. The tendency of the Courts to-day is not to pay quite so much attention to strict rules of construction, but first to determine what the will really means. Warrington L.J. in *In re Blackwell* (2) said: " . . . . the Court is inclined rather to hold an estate to be vested than contingent if the words of the will will allow it to do so." There is no gift over here, so the principle in *Phipps* v. *Ackers* (3) does not apply.

[LORD ALNESS. In *Carlton* v. *Thompson* (4) the headnote states that " The leaning of the law is towards vesting."]

The latest authority is *In re Blackwell* (2), where Pollock M.R., referring to the rule as stated in Hawkins on Wills, 3rd ed., p. 282, said (5): " If that rule is followed there is a leaning towards a construction of a will as giving a vested rather than a contingent interest." Lord Hanworth appears there to accept the general rule as stated in Hawkins on Wills. The judgments in the Court below proceed solely on the ground that there is a doubt as to the intention of the testator. If there be a doubt, then the rule is that the Court leans in favour of vesting rather than otherwise.

The fact that the condition as to attaining twenty-five is contained in a separate direction is an indication in favour of early vesting. The cases referred to in the 8th ed. of Theobald on Wills, under "Vesting of Real Estate," at p. 643, bear out this proposition: perhaps the clearest is *Attwater* v. *Attwater* (6), where *Snow* v. *Poulden* (7) was followed, and it was held that the devisee took a vested interest in the land devised, subject to divestment in the case of death under the age of twenty-five years. The rule in *Boraston's Case* (8)

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(1) 3 Bligh N. S. 260, 331.
(2) [1926] 1 Ch. 223, 233.
(3) 9 Cl. & F. 583.
(4) (1867) L. R. 1 H. L. Sc. 232.
(5) [1926] Ch. 231.
(6) (1853) 18 Beav. 330.
(7) (1836) 1 Keen, 186.
(8) (1587) 3 Rep. 19a.

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also applies to a part of this will: that rule is stated at p. 282 of the 3rd ed. of Hawkins on Wills. In support of the proposition that the interest is vested see also the observations of Lord Mansfield in *Goodtitle* v. *Whitby*. (1) [Reference was also made to *Doe* v. *Lea* (2), and *Peard* v. *Kekewich*. (3)] Returning to the terms of the will, the testator gives a devise in terms absolute, and then says when it is to take effect—at the age of twenty-five: he did not mean that there should be an intestacy in the interval. He intended that the gift should be vested.

Henry Johnston replied.

Jan. 30. The judgment of their Lordships was delivered by

LORD MAUGHAM. This is an appeal from a judgment of the Full Court of the Supreme Court of Nigeria in an action in which the appellants were the defendants and the respondent was the plaintiff. One of the appellants is now dead, and the appeal has been prosecuted by the surviving defendant. The action was brought by the respondent, as devisee of certain properties, for an account of the rents collected by the appellants in respect of these properties from the death of the testator until the date when the respondent attained the age of twenty-five years. The question for the determination of this Board is whether the devise to the respondent by the testator's will vested at the death of the testator, subject to being divested if the respondent did not attain twenty-five, or was contingent on the respondent attaining the age of twenty-five. The Full Court, following the judgment of the learned judge in the Supreme Court of Nigeria, has decided in favour of the former view, and it is not in dispute that, if that decision was correct, the order for an account of rents collected by the appellants in respect of the real properties in question must stand.

The will is dated November 2, 1917. The testator desired, as appears from the instrument, to provide for his wife, a number of collateral relatives, and, in particular, for a son,

(1) (1757) 1 Burr. 229.
(2) (1789) 3 T. R. 41.
(3) (1852) 15 Beav. 166.

the respondent, and a daughter, Phyllis Alaba Shanu. The two children on that date were infants. The respondent was aged twelve, and did not attain the age of twenty-five until 1930. The testator possessed a considerable number of freehold pieces of land and houses situate in or near Lagos, in the Colony of Nigeria, where he had carried on business as a trader, and he appears also to have possessed personal estate of substantial value. By his will, which is drawn up in clauses in English form, after revoking all previous wills and declaring that to be his last will, he appointed the appellants and one Foresythe (since deceased) to be his executors and trustees. By cl. 2 of the will he gave and bequeathed some twenty-one legacies, and it should be noted that a pecuniary legacy of 400*l.* bequeathed to his daughter Phyllis was to be deposited for her in a Lagos bank, and that the rent of a house known as 65 Campbell Street, Lagos, was to be paid to her during the period of two years immediately following her marriage as pocket money. To his son, the respondent, the testator gave a legacy of 1000*l.*, to be deposited for him in the same bank "until he attains the age of twenty-five years." It may be observed that this gift was beyond doubt a vested gift, though the testator attempted to postpone the enjoyment of it until the respondent should attain the age of twenty-five. By cl. 3 the testator devised certain land and houses in trust for his wife for the term of her natural life, and from and after her death in trust for his son, the respondent, and his heirs. By cl. 5 he devised another piece of land to his daughter Phyllis and her heirs, and there follows the sentence "this devise shall take effect two years after the marriage of my said daughter." Clause 6, which is the clause raising the present question, is in these terms :—

"6. I devise unto my son Evan Adeleye Shanu and his heirs (A) all that piece of land situate at Oil Mill Street aforesaid together with the house, buildings, and premises erected thereon and known as 'Shanuville,' 5 Oil Mill Street ; And also (B) all that piece of land situate at Campbell Street aforesaid together with the house buildings and premises erected thereon being a portion of the property known as

'Shanu Terrace' 61 and 63 Campbell Street aforesaid; And also (c) all that piece of land situate at Massey Street in the town of Lagos aforesaid together with the house buildings and premises erected thereon and known as my business place, 39 Massey Street aforesaid; And also (D) all those three pieces of land situate at Massey Street aforesaid opposite to my said business place together with the house buildings and premises erected thereon and known as 22 Massey Street; And also (E) my piece of land situate at Ebute Metta a suburb of the town of Lagos aforesaid together with the house buildings and premises erected thereon."

"These devises shall take effect upon my said son attaining the age of twenty-five years."

By cl. 8 the testator disposes of the residue of his personal estate. The trustees are to stand possessed thereof upon trust to defray the cost of the maintenance and education and of the marriage of his daughter Phyllis, and the cost of the maintenance and education of his son, the respondent. By cl. 9 he directs that his son shall attend at a certain grammar school till he attains the highest form therein, after which his trustees are to give him a four years' course of further education, and every facility to qualify in such trade or profession as his son may show an aptitude for. By cl. 10 the testator directs that a cousin, Emanuel Agemo Olajonlu, shall occupy and reside in his house at 39, Massey Street, rent free until his son, the respondent, shall attain the age of twenty-five years, and that his trustees shall let the shop attached to the said 39, Massey Street, at such rent and subject to such covenants as they shall think fit. The house, 39, Massey Street, is one of the parcels of real estate devised to the testator's son. The will contains no gift of residue of real estate.

The testator died at Lagos on May 21, 1918. His will was proved in the Supreme Court of Nigeria on July 11, 1918. The respondent attained the age of twenty-five years in March, 1930, and thereupon claimed to be entitled to the rents of the properties devised to him from the date of the testator's death. The action was tried on May 11, 1932, before Webber J. The learned judge on May 16, 1932, delivered a reserved judgment in favour of the respondent. In his reasons he stated that he had had some difficulty in coming to a conclusion, and he relied on the proposition that in cases of doubt there is always a presumption in favour of early vesting, and that it would be presumed that the testator intended the gift to be vested, subject to being divested, rather than to remain in suspense. From this judgment the appellants appealed. The appeal was heard in the Full Court on March 13, 1933, before Kingdon C.J., Berkeley and Lloyd JJ. The judgment of the Court was delivered by the Chief Justice, who said that there was a doubt as to the intention of the testator as to the date of the vesting of the property demised. He thought, however, that the learned judge in the Court below correctly stated that there was a presumption in favour of the early vesting in a case of doubt, and the appeal was accordingly dismissed.

Their Lordships' attention has been called to a passage in Theobald on Wills, 8th ed., p. 642, in which the author states that the Court (in this country) does not now lean in favour of early vesting of real estate in considering the true construction of a will, and that the Court now "gives effect to the intention expressed [in the will] without any preconception as to what the testator ought to have or has intended, subject only to this, that it may be bound by rules established by the early authorities, though it might not now adopt such rules, if the matter were at large." It seems to their Lordships to be desirable to determine in the first instance whether the passage above cited is or is not correct. It is contrary to the opinions expressed in Jarman on Wills, 7th ed., vol. 2, p. 1330, in Hawkins on Wills, 2nd ed., p. 283, 3rd ed., p. 282, and in Halsbury's Laws of England, vol. 28, p. 798. The passage generally relied upon for the principle in question is taken from the unanimous opinion of the judges delivered by Best C.J. in the case of *Duffield* v. *Duffield*. (1) In the construction of devises of real estate he said: "The judges from the earliest times were always inclined to decide, that the estates devised were vested; and it has long been an

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established rule for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt ; and what seems to make a condition, is holden to have only the effect of postponing the right of possession."

In delivering the opinion Best C.J. stated (1) some of the reasons which had induced the judges to adopt the rule, and it may be observed that Lord Eldon, who was presiding, expressed his concurrence with the opinion of the judges. Their Lordships have not been referred to any judgment throwing doubt upon the general validity of the rule, if it may be so described, although in subsequent statements of the Court, the doctrine has been laid down in somewhat less emphatic terms, and it may well be that the present view is more accurately expressed in the language used by Lord Warrington, as Warrington L.J., in the case of *In re Blackwell. Blackwell* v. *Blackwell.* (2) It should be observed that a similar principle has been formulated in a number of cases in connection with the very similar, if not identical, question whether a condition affecting an estate is to be construed as a precedent or as a subsequent condition. It has been laid down that in cases of doubt the presumption is in favour of treating the condition as subsequent. The authorities will be found referred to in the case of *In re Greenwood. Goodhart* v. *Woodhead.* (3) On the whole their Lordships see no reason for doubting that the established rule for the guidance of the Court in construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness.

In the present will the question may be said to depend upon the meaning of the words " shall take effect upon my son attaining the age of twenty-five years." The words

(1) 3 Bligh N. S. 330.

(2) [1926] Ch. 223, 233–234.

(3) [1903] 1 Ch. 749.

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"take effect" in this connection have not apparently been made use of in any will which has come before the Courts, and their meaning is untouched by authority. In this case several considerations may help in their construction. It is not immaterial to note that the devise to the son in cl. 6 begins in the form of an absolute gift, and that the sentence which occasions the difficulty follows in the form of a separate clause, which, if the appellant's view is correct, must be treated, though it certainly is not wholly free from ambiguity, as cutting down the prior devise. Again, the legacy to the son is to be deposited in a bank until the son attains the age of twenty-five years ; and this may be thought to suggest that the object of the testator with regard to his son was not to prevent him having any estate in the real property unless and until he should attain the age of twenty-five years, but rather to postpone his enjoyment, and if possible to prevent him from misapplying the property before he was twenty-five. Further, some weight may properly be attached to the consideration that if the appellant is correct, and the devise is contingent, the rents and profits of the properties in question until the son attained the age of twenty-five would pass as on an intestacy, with the result that neither the testator's son nor daughter would in any circumstances derive any benefit from such rents and profits, a singular result having regard to the fact that the testator has actually directed his trustees to let the shop attached to 39, Massey Street premises, at such rent and subject to such covenants as they shall think fit. On the other hand, no weight can properly be attached to the direction that the cousin, Emanuel, shall occupy and reside in the house at 39, Massey Street, since this appears to be merely a personal right of occupation and not the gift of an estate.

On a consideration of the whole of the will and of the circumstances in which it was made, and applying the rule or principle above referred to in relation to vesting, their Lordships are of opinion that the true construction of the words "shall take effect" is that they relate to the devise taking effect *in possession*, and are not intended to impose a condition precedent on the devise contained in cl. 6 of the will.

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The devise must therefore be construed as vesting at the death of the testator, subject to divestment if the respondent should fail to attain the age of twenty-five.

They will accordingly humbly advise His Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

Solicitors for appellant : *Benham, Synott & Wade.*
Solicitors for respondent : *Stoneham & Sons.*

[PRIVY COUNCIL.]

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Feb. 14.

RIBEIRO . . . . APPELLANT ;

AND

SIQUEIRA E. FACHO AND ANOTHER . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Eastern Africa—Appeal—Judgment ordering Account to be furnished—No formal Decree drawn up—Account prepared and presented—Decree drawn up—Ante-dated to date of Judgment—Appeal not timeously lodged—Party's duty to have Judgment drawn up in form of Decree—Rules of the Court of Appeal for Eastern Africa, r. 8, *sub-r.* 1.

By r. 8, sub-r. 1, of the Rules of the Court of Appeal for Eastern Africa as to appeals from the Supreme Court of Kenya :

> " The memorandum of appeal shall be presented in civil cases within three months . . . . from the date of the decree appealed against. . . . . "

By a judgment delivered in the Supreme Court of Kenya on August 19, 1932, the appellant was directed to furnish an account of his administration of certain trust property. No formal decree following upon that judgment was drawn up until the account had been taken and confirmed by the Court on June 26, 1933. A decree was then drawn up on that date, and entered, and ante-dated to August 19, 1932, the date of the judgment. On an application by the appellant for leave to appeal out of time against the decree :—

Held, that it was the duty of the appellant, if he wished to appeal against the judgment of August 19, 1932, and to ensure his appeal being within time, to take steps to have that judgment drawn up in the form of a decree. Having failed in that duty his application was dismissed.

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* *Present :* LORD ALNESS, LORD MAUGHAM, and SIR SIDNEY ROWLATT.

Jivanji and Another v. *Jivanji and Another*, Kenya L. R., 1929–30, vol. 12, 41, approved and applied.

Decree of the Court of Appeal for Eastern Africa, L. R. of Court of Appeal for Eastern Africa, 1934, vol. I., 1, affirmed.

APPEAL (No. 102 of 1934), by special leave, from a decree of the Court of Appeal for Eastern Africa (January 10, 1934), dismissing an application by the appellant, Rozendo Ayres Ribeiro, for leave to appeal out of time from a judgment and decree of the Supreme Court of Kenya (August 19, 1932).

On June 7, 1929, the respondents, Olivia Da Ritta Siqueira E. Facho and Lilla Ozlinda Pia Da Ritta Siqueira, daughters of the late B. C. Siqueira, instituted proceedings in the Supreme Court of Kenya at Nairobi against their mother and the appellant as co-trustees of their (the respondents') share in the estate of their late father, for an order against them to furnish an account of their administration of the trust property, and for payment of an amount alleged to be due to them. The suit was consolidated with a second suit by the respondents in which the appellant was also one of the defendants, and judgment was given in the consolidated suit by Barth C.J. on August 19, 1932. By that judgment the defendants were ordered to furnish accounts. No formal decree was drawn up following upon that judgment.

Accounts were duly taken before the Registrar of the Supreme Court of Kenya, and on June 19, 1933, he held that the appellant was liable to pay to the respondents Shs.101,615, with interest at six per cent. On June 26, 1933, the Chief Justice confirmed the Registrar's report, and on that date a decree, which included the findings against the appellant, was drawn up, entered, and signed by the Chief Justice. That decree was ante-dated to the date of the above judgment, August 19, 1932.

On September 16, 1933, the appellant submitted to the Registrar of the Court of Appeal a memorandum of appeal against the judgment and decree of August 19, 1932. It is provided by r. 8, sub-r. 1, of the Rules of the Court of Appeal for Eastern Africa that the memorandum in a civil case must be presented within three months of the date of the decree appealed against. The Registrar refused to accept the memorandum of appeal, and on November 23, 1933, the appellant presented an application to the Court of Appeal for leave to appeal out of time.

The Court of Appeal (Abrahams C.J., Sheridan and Lucie-Smith JJ.) dismissed the application. The application is reported at L. R. of Court of Appeal for Eastern Africa, 1934, vol. I., 1.

1936. Jan. 14, 16. *Pritt K.C.* and *Lawrence Tooth* for the appellant.

Evershed K.C. and *Theobald Mathew* for the respondents.

The facts and the relevant contentions appear from the judgment of the Judicial Committee.

[Reference was made to the Kenya Civil Procedure Ordinance, 1924, s. 2, sub-ss. 4, 10, 15, ss. 66, 68; Ord. XVIII., r. 7, of the Kenya Civil Procedure Rules, 1927; The Eastern African Court of Appeal Rules, 1925, in Laws of Kenya, 1926, vol. i., 64; *Coles and Ravenshear, In re* (1); *Robins* v. *National Trust Co.* (2); and *Jivanji and Another* v. *Jivanji and Another.* (3)]

Feb. 14. The judgment of their Lordships was delivered by

Lord Alness. This is an appeal, by special leave, from a decree of the Court of Appeal for Eastern Africa, dated January 10, 1934, dismissing an application by the appellant for leave to appeal out of time from a judgment and decree of the Supreme Court of Kenya, dated August 19, 1932.

The proceedings which gave rise to the appeal were instituted on June 7, 1929, in the Supreme Court of Kenya at Nairobi, by the respondents, who are daughters of the late B. C. Siqueira, as plaintiffs, against (1.) the appellant, and (2.) the respondents' mother, as defendants. The latter, by a trust deed dated October 27, 1910, had appointed the appellant to act jointly with her as co-trustee of the respondents' share in the estate of their late father. The purpose of the suit was to obtain an order against two defendants—one of whom was the appellant, and the other the respondents' mother—to furnish an account of their administration of the trust property, and for payment of an amount alleged to be due by them.

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(1) [1907] 1 K. B. 1.

(2) [1927] A. C. 515, 522.

(3) Kenya L. R., 1929–30, vol. 12, 41.

The appellant pleaded that the trust deed had not been acted upon, and that he took no part in the administration of the estate. The other defendant pleaded that she was ignorant of business affairs, and that the proper person to render accounts was her brother, who had been appointed her co-trustee under the trust deed, and who, by virtue of a power of attorney and a partnership deed, had managed the estate of her late husband.

A second suit was instituted by the respondents on September 13, 1929, against their mother alone. Her brother, who has already been referred to, and the appellant were joined as co-defendants. This suit referred to certain other property, which is not material to this appeal. The first and second suits were ultimately consolidated.

The consolidated suit, out of which this appeal arises, came before the Chief Justice of the Supreme Court of Kenya, Sir Jacob Barth, and on August 19, 1932, he delivered a written judgment upon it. By that judgment all three defendants were ordered to furnish an account, but a distinction was drawn between the liability of the appellant and that of the other defendants. No formal decree, following upon that judgment, was drawn up.

In virtue of the judgment, accounts were duly taken before the Registrar of the Supreme Court of Kenya, (1.) as between the respondents and the first and second defendants, and (2.) as between the respondents and the appellant. On June 19, 1933, the Registrar submitted his report upon the accounts to the learned Chief Justice. The Registrar held that, in respect of the trust moneys referred to, the appellant was liable to pay to the present respondents the sum of Shs.101,615, the equivalent of Rs.22,000, with interest at six per cent.

On June 26, 1933, the learned Chief Justice confirmed the Registrar's report, and on that date a decree, which included findings against the appellant, was drawn up, entered, and signed by the Chief Justice. This decree was ante-dated, and was described as " given under my hand and the seal of the Court on the 19th day of August, 1932 "—being the date of the judgment aforesaid. On September 16 the appellant submitted to the Registrar of the Court of Appeal a memorandum of appeal against the judgment and decree of August 19, 1932, in which he craved for leave to appeal against it upon certain grounds which were set out in the memorandum. The Registrar refused to accept the memorandum of appeal. On November 23, 1933, the appellant presented an application to the Court of Appeal for leave to appeal out of time. This application was duly heard by the Court of Appeal, and, by decree dated January 10, 1934, the application was dismissed, for reasons which appear in the written judgment of the Court.

On February 10, 1934, an application by the appellant to the Court of Appeal for leave to appeal to His Majesty in Council from the decree aforesaid was dismissed. On May 14, 1934, however, an application by the appellant for special leave to appeal from the said decree to His Majesty in Council was granted by Order in Council of that date.

Before the Board the appellant contended: (1.) that his memorandum of appeal was timeously lodged, and, alternatively, (2.) that, in the circumstances, he should have been allowed to file it out of time.

(1.) As regards the first contention, the rules of the Court of Appeal provide that " the memorandum of appeal shall be presented in civil cases within three months . . . . from the date of the decree appealed against." In this case, the date affixed to the decree appealed against was August 19, 1932, and it would seem therefore that the memorandum of appeal was not timeously lodged. The appellant, however, contended that the ante-dating of the decree was improper and wrong, and that it should bear the

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date on which it was in fact pronounced. On that question the Court of Appeal offered no opinion, inasmuch as the application before them was one to appeal out of time. Equally their Lordships, for the same reason, consider themselves absolved from pronouncing an opinion on that matter. The order appealed against is one dismissing an application by the appellant to appeal out of time. Their Lordships may add that they would find difficulty in affirming the contention of the respondents that the original judgment of August 19, 1932, not having been drawn up in the form of a decree within the definition contained in s. 2, sub-s. 4, of the Kenya Civil Procedure Ordinance, 1924, could be treated as a decree from which an appeal might competently have been taken.

(2.) In holding that the appellant had not made a case for being allowed to appeal out of time, the Court of Appeal exercised a judicial discretion, and manifestly such a decision would require strong reasons in order to justify interference with it on appeal. Their Lordships are unable to hold that such reasons have been forthcoming. There can be no doubt that the appellant had an opportunity, if not a duty, in the event of desiring to appeal, to take steps to have the judgment of August 19, 1932, drawn up in the form of a decree. The Court of Appeal say " Once the judgment was delivered, he [the appellant] could and should have taken steps to ensure his appeal being within time, and, having failed to do so, there are no special circumstances which would justify our granting the application." If further authority for that proposition be required, it will be found in the case of *Jivanji and Another* v. *Jivanji and Another*. (1) The headnote in that case bears " that it is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the Court to draw up and issue the formal decree or order." In that duty the appellant failed. In these circumstances it is not possible for their Lordships to hold that the Court of Appeal exercised its

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(1) Kenya L. R., 1929–30, vol. 12, 41.

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discretion improperly in the matter. That being so, the appeal must fail. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Hy. S. L. Polak & Co.*
Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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Feb. 27.

HULME-KING . . . . APPELLANT;

AND

DE SILVA . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Ceylon—Husband and Wife—Decree nisi of divorce on husband's petition—Settlement on husband out of property of wife—Reduced on appeal—Pending appeal to Privy Council—Application by wife for decree absolute—Compromise agreement—Husband's objection to decree absolute withdrawn—Appeal to Privy Council abandoned—Financial settlement terms—Public policy—Adjustments of decrees and certification—Ceylon Civil Procedure Code, No. 2 *of* 1889, *ss.* 349, 604, 605 *and* 617*—Married Women's Property Ordinance, No.* 18 *of* 1923, *s.* 5.

The respondent obtained in the District Court of Colombo a decree nisi for divorce against his wife, the appellant, and by the decree further obtained under s. 617 of the Civil Procedure Code a direction that a settlement should be made out of the appellant's property to secure to him a monthly income of Rs.1000. On appeal, the issue of adultery not however being contested, the Supreme Court reduced the monthly income under the settlement to Rs.400. Against that decision the respondent obtained leave to appeal to His Majesty in Council. A few months previously the appellant had applied to have the decree nisi made absolute, but that was refused on the ground of the respondent's proposed appeal to the Privy Council. The appellant then filed a petition of appeal to the Supreme Court against the order refusing to make the decree absolute. At that stage, however, the disputes between the parties were compromised by an agreement under which (inter alia) the appellant agreed to pay to the respondent Rs.750 a month and certain arrears, the respondent agreeing to consent to the appeal of the appellant

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* *Present:* Lord Atkin, Lord Maugham, and Sir Sidney Rowlatt.

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against the refusal to make the decree absolute being allowed, and also agreeing to abandon his appeal to the Privy Council. In due course the appellant's appeal, by consent of the respondent, was allowed, and the decree nisi was made absolute. After paying to the respondent the monthly sums under the agreement for nearly four years the appellant ceased payment, and the respondent instituted proceedings to recover the monthly payments in default, together with interest:—

Held, first, that in Ceylon there is nothing either in the law or the practice to prevent the application under ss. 604 and 605 of the Civil Procedure Code for the making of a decree absolute being made by the innocent or by the guilty spouse. All that the respondent had agreed to do as regarded the decree absolute was to abandon an appeal to the Privy Council and not to oppose an application by the wife, the result of which in the circumstances was inevitable, and the agreement had not, therefore, any improper object and was not in any way contrary to public policy.

Held, secondly, that, although before the decree absolute the relationship of husband and wife existed between the respondent and the appellant, under s. 5 of the Married Women's Property Ordinance, No. 18 of 1923, a wife is under no disability as regards coverture in disposing of her movable or immovable property in favour of her husband, and there is nothing in that section, or in the Ordinance or in the Roman-Dutch law, which justifies an exception from the generality of the provisions of transactions between spouses.

Soysa v. *Soysa* (1916) 19 Ceylon N. L. R. 146 considered.

Held, lastly, that s. 349 of the Civil Procedure Code applies only to decrees for the payment of money, and the agreement was not therefore an adjustment of a decree within the meaning of s. 349 which required to be certified before being recognized by the Court.

Decree of the Supreme Court of Ceylon (1934) 36 Ceylon N. L. R. 57, affirmed.

APPEAL (No. 95 of 1934) from a decree of the Supreme Court of the Island of Ceylon (March 28, 1934), affirming a decree of the District Court of Colombo (April 5, 1933).

The respondent to this appeal, Henry Peter Christopher de Silva, was the husband of the appellant, Dorothy Margaret Catherine Hulme-King, until a decree absolute was pronounced by the Supreme Court of Ceylon on May 18, 1926, in certain divorce proceedings brought at the instance of the respondent.

The action out of which the appeal arose was brought by the respondent to recover arrears of certain monthly payments alleged to be due to him from the appellant under an agreement

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dated February 4, 1926, in which the respondent (inter alia) agreed to withdraw his then existing opposition to the making absolute of the decree nisi which he had obtained against the appellant.

The facts appear fully from the judgment of the Judicial Committee.

The District Judge of Colombo made a decree in favour of the respondent for Rs.12,118, the amount claimed.

An appeal by the present appellant to the Supreme Court of the Island of Ceylon (Garvin S.P.J. and Poyser J.) was dismissed. The appeal is reported at (1934) 36 Ceylon N. L. R. 57.

1936. Jan. 30, 31. *Hallett K.C.* and *de Silva* (K.C. Ceylon) for the appellant. The agreement of February 4, 1926, was made while the appellant and the respondent were still married—it was made between the dates of the decree nisi and the decree absolute. The question is whether that agreement is or was enforceable in point of law. It was supplemented by a mortgage bond designed to give security for the performance of its financial provisions. The objections to the agreement fall under three heads : (1.) It is unenforceable because it is contrary to public policy ; (2.) the parties being husband and wife at the date of an agreement whereby the wife settled property on her husband—and having regard to the mortgage bond immovable property was involved—it is not an enforceable agreement. That is a matter of Roman-Dutch law. The District Judge stated that the agreement was expressly made good, if it would otherwise have been bad, by s. 13 of the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876. This section was dealt with in *Soysa* v. *Soysa*. (1) That section has been, and at all material times was, repealed by s. 4 of Ordinance No. 18 of 1923, and there does not appear to be a similar section in the 1923 Ordinance. The position is very remarkable. (3.) The third main objection involves a question of procedure. In Ceylon the policy appears to be, and it is laid down in the Civil

(1) (1916) 19 Ceylon N. L. R. 146.

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Procedure Code, that if the parties adjust their differences while the action is going on, that adjustment should be notified to the Court. Sect. 349 of the Civil Procedure Code deals with that matter: the sections which relate to the granting of a decree are ss. 604 and 605. Sect. 625 deals with remarriage; there was at any rate a doubt whether the appellant could remarry while the appeal to the Privy Council was pending.

Para. 6 of the agreement provides that the respondent should consent to the appeal of the appellant against the order of the District Court refusing to make the decree absolute being allowed. Any contract whereby one party is induced to concur in the granting of a decree absolute, or to do anything which will put an end to the marriage, although a decree nisi has been obtained, is against public policy. The agreement is unenforceable on that ground. [At this stage counsel abandoned his claim in reconvention.] [Reference was made to s. 13 of the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876; ss. 349, 408, and 617 of the Civil Procedure Code.] The decision in *Soysa* v. *Soysa* (1) puts me in a great difficulty so far as the 1876 Ordinance is concerned.

[LORD MAUGHAM. In the circumstances of this case there was an absolute right to a decree absolute at the time it was sought.]

The position was that the District Judge had said, wrongly or rightly: "you are not entitled to this decree, in my opinion the matter should await the decision of the appeal to the Privy Council." The Courts have always reprobated attempts to use the withholding or delaying of a decree absolute for the purpose of obtaining money. The authorities bearing on this are collected in Rayden and Mortimer on Divorce, 3rd ed., at p. 381, under the head of "Maintenance." [Reference was made to *Rutter* v. *Rutter* (No. 2) (2); *Skipwith* v. *Skipwith* (3); *Warwick* v. *Warwick* (4); and *Hunter* v. *Hunter*. (5)] The last of these cases is easily distinguishable, the actual decision depending on a statutory proviso: the

(1) (1916) 19 Ceylon N. L. R. 146.
(2) [1921] P. 421.
(3) (1928) The Times Newspaper of July 23.
(4) (1928) 73 S. J. 12.
(5) [1934] P. 92.

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President said (1): "I should view with great disfavour any case in which I was satisfied that there had been a deliberate holding up of the decree absolute or a deliberate failure to prosecute the petition after decree nisi for the purpose of extracting terms more favourable to the petitioner than those contemplated when the decree nisi was pronounced." Such a bargain as that in this present case should not be enforced by the Courts. The other ground on which the agreement is against public policy is that the law, quite apart from collusion, reprobates any contract which will tend to induce the parties to proceed to decree absolute from decree nisi; in other words, any contract which will tend to prevent a reconciliation between the parties. The reason is that the Court favours a reconciliation between the parties, even after decree nisi, and, further, it is nothing to the point in deciding whether a contract should be upheld, whether in that particular case a reconciliation can be excluded from the realm of probability. [Reference was made to *Fender* v. *Mildmay*. (2)] In the present case there is a contract which tends against reconciliation. A bargain for financial consideration to remove the obstacles to the making of a decree absolute, whether those obstacles are real or illusory, is a bargain which the Courts ought not to enforce.

De Silva followed. This action must fail because the agreement of February 4, 1926, was not certified on record in accordance with the provisions of s. 349 of the Civil Procedure Code. That point is supported on three grounds: (1.) On the plain meaning of the words of s. 349; (2.) on a consideration of the legislation which that section replaced; and (3.) on general considerations. [He referred to s. 349.] There is no doubt on the authorities that the agreement between the parties to alter the terms of the decree would be an "adjustment," and on the question whether s. 349 is applicable to any decree but a money decree, it definitely is applicable to other decrees: *Háji Abdul Rahiman* v. *Khojá Khάki Aruth*. (3)

(1) [1934] P. 94.
(2) [1936] 1 K. B. 111.
(3) (1886) I. L. R. 11 B. 6.

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[LORD MAUGHAM. It was a money decree in that case.]

The present case is as close an analogy as is possible to *Rahiman's* case. (1) With regard to the test of independence between the subsequent agreement and the decree, this case falls well within the margin; this is not an independent agreement.

[LORD MAUGHAM. I cannot conceive a case other than a payment of money under a decree in which s. 349 would do anything.]

There is no good ground for the suggestion that that section is applicable only to money decrees.

[LORD MAUGHAM. It says nothing whatever to the effect that the adjustment shall not be recognized by the Court; it imposes an obligation to notify what happened.]

[LORD ATKIN referred to Mulla's Code of Civil Procedure, 10th ed., at p. 695, dealing with certified adjustment.]

That deals with the earlier cases, and there is an enormous conflict of opinion. [Reference was made to Woodroffe and Ameer Ali on the Code of Civil Procedure, at p. 891; and to *Sankaran Nambiar* v. *Kanara Kurup*. (2)] On the question of the Court dealing with questions relating to the execution of a decree, see s. 344 of the Civil Procedure Code. There is nothing on the face of s. 349 which confines it to a money decree. It really comes back to whether it is possible to interpret that section as applicable to decrees other than money decrees. It should be given an extensive interpretation.

Stephen Chapman for the respondent was not called upon.

Feb. 27. The judgment of their Lordships was delivered by

LORD MAUGHAM. This is an appeal from a decree of the Supreme Court of the Island of Ceylon, dated March 28, 1934, affirming a decree of the District Court of Colombo, dated April 5, 1933. The action was one in which the respondent was the plaintiff and the appellant was the defendant. The respondent was the husband of the appellant until the decree absolute pronounced by the Supreme Court on May 18, 1926,

(1) I. L. R. 11 B. 6.

(2) (1898) I. L. R. 22 M. 182.

in certain divorce proceedings brought at the instance of the respondent.

The action which led to the present appeal was commenced by the respondent by plaint dated May 11, 1932, in which the respondent claimed from the appellant a sum of Rs.12,118 under and by virtue of an agreement, No. 326, dated February 4, 1926, and a mortgage bond, No. 329, dated February 18, 1926. Of the sum named Rs.11,500 were arrears of monthly payments due from the appellant to the respondent by virtue of the said instruments. The balance claimed was for interest. The circumstances under which the said instruments were entered into are not in dispute. The parties were married on May 10, 1915. On December 15, 1924, the respondent in an action in the District Court of Colombo, No. 10,899, obtained a decree nisi for divorce against his wife, the first defendant. By that decree the respondent further obtained under s. 617 of the Civil Procedure Code of Ceylon a direction that a settlement be made out of the property of the appellant to secure to the respondent a monthly income of Rs.1000. There was a second defendant, Mr. Lister Hulme-King, a person with whom the appellant was alleged to have committed adultery, who was ordered to pay to the respondent Rs.10,000 as damages. From the said decree of December 15, 1924, all the parties appealed. The issue of adultery was, however, no longer contested on such appeal. On October 27, 1925, the Supreme Court by its judgment varied the decree of the District Court by reducing the damages payable by the second defendant to the sum of Rs.2500, and by reducing the monthly income to be secured by the settlement to the respondent to the sum of Rs.400.

On November 30, 1925, the respondent, who was dissatisfied with the reduced monthly income secured to him, obtained from the Supreme Court conditional leave to appeal to His Majesty in Council against the last-mentioned judgment, and final leave to appeal was granted on February 2, 1926. Previously to that date, namely, on November 6, 1925, the appellant applied by motion in the District Court of Colombo that the decree nisi of divorce dated December 15, 1924, be made absolute, in accordance with ss. 604 and 605 of the Civil Procedure Code. The respondent objected to this course on the footing of his proposed appeal to His Majesty in Council, and the District Judge on November 10, 1925, declined to make the decree absolute. The appellant filed a petition of appeal to the Supreme Court against that order. It was at this stage that the disputes between the appellant and the respondent were compromised by the agreement No. 326.

The agreement was made at Colombo on February 4, 1926, between the respondent and the appellant, and it is notarially attested. It recites the marriage of the parties on May 10, 1915, the proceedings in divorce in the District Court of Colombo, and the order made thereon, the appeal to the Supreme Court, the order of the Supreme Court, the application by the present respondent for leave to appeal to His Majesty in Council, and that the respondent and the appellant had agreed to effect a compromise regarding the monthly allowance payable to the respondent, and to settle all matters and disputes between them. By cl. 1 the appellant agreed to pay to the respondent Rs.750 per month, commencing on January 1, 1926, and to execute as security for such payment a primary mortgage of certain property belonging to the appellant. By cl. 2 the appellant agreed to pay to the respondent Rs.6000 in full settlement of the monthly allowance due to him up to December 31, 1925. By cl. 3 the respondent agreed to pay to the appellant her taxed costs of appeal in the original action. By cl. 4 he agreed to withdraw his appeal in another action between the parties. By cl. 5 the respondent agreed to renounce his right to any movable property of the appellant. By cl. 6 he agreed to consent to the appeal of the appellant against the order of the District Court dated November 10, 1925, being allowed, the parties bearing their own costs; and by cl. 7 he agreed not to prosecute his appeal to His Majesty in Council against the judgment of the Supreme Court so far as it affected the appellant. Clause 8 gave the respondent the right, in the event of default by the appellant in payment of the monthly payments, to apply to the District Court for the appointment of a receiver. On February 18, 1926, the mortgage bond, No. 329, was executed by the attorney for the appellant in compliance with cl. 1 of the agreement.

On May 18, 1926, the Supreme Court gave judgment in the appellant's appeal against the order of the District Court dated November 10, 1925, refusing the decree absolute. The respondent, by his counsel, consented to the appeal being allowed, in other words, consented to the application by the appellant to have the decree made absolute. The Supreme Court dealt with the appeal to the Privy Council and stated that the question whether or not the marriage should be dissolved was no longer in issue. Garvin S.P.J. further observed as follows: "That appeal cannot in any way affect the question of the dissolution of the marriage between the parties. The provisions relating to matrimonial actions seem to indicate that in the case of an action for a dissolution of marriage the order directing such marriage to be dissolved should be embodied in a decree nisi. At the expiration of three months in the absence of any objection the Court is required to make the decree so entered absolute." He concluded by saying that he saw no reason why the decree nisi should not be declared absolute. The decree absolute was made.

After the said judgment and order of the Supreme Court the appellant married Mr. Lister Hulme-King, the second defendant above referred to. She paid to the respondent, who had complied with all his obligations under the agreement, the monthly sums of Rs.750 up to December, 1930, and Rs.500 out of the allowance for the month of January, 1931; but she thereafter refused to make any payment to the respondent, and this action was accordingly commenced to recover the amount of such monthly payments as were in default, together with interest.

On April 5, 1933, the District Judge decided the various points which had been raised by the appellant in a sense favourable to the respondent, and granted him a decree for the relief he claimed. He also dismissed the claim of the appellant in reconvention, a claim by the appellant to recover sums already paid by her under the agreement No. 326. It may be stated here that counsel for the appellant did not dispute this part of the case, and their Lordships need not further refer to it. The appellant appealed to the Supreme Court, who on March 28, 1934, delivered their judgment. In that appeal the appellant relied on three contentions, substantially those on which she relied before their Lordships. The learned judges, consisting of Garvin S.P.J., and Poyser J., unanimously decided against the contentions raised on behalf of the appellant, and dismissed the appeal. It is from that decision that the appellant has appealed to His Majesty in Council.

Three points were taken by the appellant before their Lordships. First, it was said that the agreement No. 326, and the bond No. 329 executed in pursuance thereof, were void as being contrary to public policy. Secondly, it was argued that the said agreement, having been entered into before the decree absolute, and therefore whilst the relation of husband and wife still subsisted between the parties, and without the sanction of the Court, was unenforceable under the law of Ceylon. Thirdly, it was contended that the agreement was an "adjustment" of a decree within the meaning of s. 349 of the Civil Procedure Code, and, not having been certified to the Court whose duty it was to execute the decree, could not be recognized by any Court, and therefore could not be made the basis of an action.

The first point appears to be based on the suggestion that the agreement No. 326 amounted in substance to a bargain for the sale of the decree absolute, or, more accurately, amounted to an agreement by the husband for a pecuniary consideration not to oppose an application by the wife for an order that the decree nisi should be made absolute. If the suggestion were well founded in fact the point would, no doubt, call for careful consideration; but in the view of their Lordships it is not. A number of English authorities were referred to, but the law of Ceylon in regard to making a decree absolute rests on s. 605 of the Civil Procedure Code, and differs in an important respect from the English law and well settled practice. The application in England can

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only be made by the innocent party. In Ceylon the relevant section is in these terms: "605. Whenever a decree *nisi* has been made and no sufficient cause has been shown why the same should not be made absolute as in the last preceding section provided within the time therein limited, such decree *nisi* shall on the expiration of such time be made absolute." If the conditions have been complied with (i.e., if no cause has been shown, and the time fixed has elapsed) the Court is bound to make the decree absolute, and it has been held that in Ceylon there is nothing either in the law or the practice to prevent the application being made by the innocent or by the guilty spouse. Their Lordships see no reason for differing from this view, and, indeed, they were not invited to hold the contrary. The conclusion is inevitable that all that the innocent husband agreed to do as regards the decree absolute was to abandon an appeal to the Privy Council and not to oppose an application by the wife, the result of which was in the circumstances inevitable. The language used by Garvin S.P.J. in delivering judgment aptly describes the position (1): "It is not suggested that even at the date of this agreement there was any fact or circumstance which should in the interests of justice have been brought to the notice of the Court which had been suppressed or that the parties had agreed to suppress any such facts . . . . . Now there is not the slightest suggestion of any collusion or even impropriety in regard to the institution of these proceedings or their conduct up to the time of decree nisi and until its confirmation by the Supreme Court. And, moreover, there is not even a suggestion that there was any collusion for any improper purpose at the time this agreement was entered into. In consenting not to oppose the appeal from the order made by the District Court upon the defendant's application for a decree absolute the plaintiff was only doing indirectly that which he was entitled to do himself . . . . . Since the defendant had already herself taken steps to that end, I can see no impropriety in the plaintiff consenting that such a decree should be entered."

(1) 36 Ceylon N. L. R. 65–67.

Their Lordships have no difficulty in agreeing with the Supreme Court that there was nothing in the agreement, or in the circumstances under which it was entered into, which would justify the Court in holding that it had any improper object or purpose, or that it was in any way contrary to public policy.

The second point may also be concisely dealt with. Their Lordships accept the view that prior to the decree absolute the relation of husband and wife existed between the appellant and the respondent. Whatever may have been the capacity of a wife in Ceylon prior to the year 1923 as regards a disposition, transfer or settlement of movable or immovable property in favour of her husband, their Lordships can see no reason for doubting that under s. 5 of Ordinance 18 of 1923 a wife is under no disability as regards coverture in disposing of her movable or immovable property in favour of her husband. Sect. 5 of the Ordinance (borrowed, as will be seen, from s. 1 of the Married Women's Property Act, 1882) is in these terms:—

"(1.) A married woman shall, in accordance with the provisions of this Ordinance, be capable of . . . . disposing by will or otherwise of any movable or immovable property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

"(2.) A married woman shall be capable of entering into, and rendering herself liable in respect of and to the extent of her separate property on, any contract, and of . . . . being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*."

There is nothing in this section, or in the Ordinance or in the Roman-Dutch law, which justifies an exception from the generality of the provisions of transactions between spouses. It may be observed by way of illustration that dispositions between husband and wife were illegal at common law in England before January 1, 1883, but made legal by s. 1 of the Married Women's Property Act by words not distinguishable as regards their effect from s. 5 of the Ordinance. Their Lordships feel a difficulty in relying on the decision

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of the Board in *Soysa* v. *Soysa* (1), since that case was based on s. 13 of Ordinance No. 15 of 1876, which was repealed by s. 4 of Ordinance 18 of 1923. The question, however, is now free from doubt under s. 5 of that Ordinance, and this point plainly fails.

The third point relied on by the appellant depends upon the true construction of s. 349 of the Civil Procedure Code, a section which has occasioned considerably difficulty both in Ceylon and in India, where a provision very similar is in force. Sect. 349 is as follows: "If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, he shall certify such payment or adjustment to the Court whose duty it is to execute the decree. The judgment-debtor may also by petition inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause on a day to be fixed by the Court why such payment or adjustment should not be recorded as certified. And if after due service of such notice the decree-holder fails to appear on the day fixed, or having appeared fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly. No such payment or adjustment shall be recognised by any Court unless it has been certified as aforesaid." The appellant contends that the agreement No. 326 was an adjustment of a decree of Court, that it was not certified to the Court whose duty it was to execute the decree, and that the agreement therefore cannot be recognized by any Court. A number of questions arise on this contention. Does the section apply to any decree except a money decree? Is the agreement "an adjustment" of the decree? Ought the final words "no such payment or adjustment shall be recognised by any Court unless it has been certified as aforesaid" to be construed as a rule of evidence excluding every evidence of the payment or adjustment of a decree unless it has been certified, or have they the effect of rendering the payment or adjustment wholly void and of no effect unless duly certified?

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(1) 19 Ceylon N. L. R. 146.

In the view of their Lordships the section relates only to decrees for the payment of money. It begins with the words: " If any money payable under a decree is paid out of Court," and the next words are: " or the decree is otherwise adjusted." " Otherwise " grammatically can only mean " otherwise than by payment out of Court," and no doubt payment into Court does not require a certificate. If we add these words the section would run: " If any money payable under a decree is paid out of Court or the decree is adjusted otherwise than by payment into Court or out of Court, etc." The definite article before the word " decree," and words which seem to assume the possibility of the judgment-debtor paying money out of Court in satisfaction of the decree, point strongly to the conclusion that the decree which may be adjusted is one for the payment of money. The matter may be tested by applying the facts of the present case. The decree in question, so far as " the decree-holder " and " the judgment-debtor " (terms which are defined in the Code) are concerned, is for the execution by the latter of a settlement securing to the former a certain monthly sum. If we introduce these words into the first sentence we get the following: " If any money payable under a decree is paid out of Court or a decree for the execution of a settlement is adjusted otherwise than by payment out of Court, etc."—a strange sequence of ideas where the decree is not one for the payment of money, for one would not expect a decree for the execution of a deed, or indeed for any specific relief (e.g., the delivery up of a chattel or of land) to be " adjusted " in the ordinary course by a payment out of Court. Nor does the difficulty stop there. The consequence of the lack of a certificate is that " the payment or adjustment is not to be recognised by any Court." Suppose the decree is for the execution of a deed to carry out defined objects, and that the parties by mutual agreement have varied the substance of it in some respects. On the assumption that such a decree is within the section, and that what has been done is an adjustment, the Court is apparently precluded from recognizing this adjustment, and it would seem as though the Court executing the decree would be bound to require a deed to be executed in exact conformity with the decree at the suit of the decree-holder whose default has occasioned the whole difficulty, and even though in the result he would, or might, become apparently entitled to some at least of his relief twice over.

It is not difficult to see good reasons for the section in relation to money decrees in a country where experience may have shown that after such a decree disputes constantly arose between the parties whether payment in satisfaction had in fact been made wholly or in part, so that the action had in effect to be tried over again. On the other hand, harsh as the rule may be, there is no practical difficulty in making a judgment-debtor pay money twice over if he has neglected a certain precaution ; but it seems very difficult to think that the Legislature has contemplated a position in which the Court would require a man to deliver up movable or immovable property which he has already parted with to the judgment-creditor, and would be precluded in the exercise of its great powers as regards execution from " recognising " the true facts.

Their Lordships are conscious that the latter of these difficulties might be avoided by attaching a somewhat artificial meaning to the words " adjustment " and " adjusted." If the Court is at liberty to recognize anything done by the judgment-debtor *in conformity* with the decree (other than a payment), the effect of any partial compliance with it would have to be considered before executing the decree. This contention has considerable force, but, without expressing a final opinion on it, their Lordships must observe that such a construction would not help the appellant, since the settlement executed in the present case is in substance a full compliance with the decree ; the objection to the agreement and the mortgage bond is that they effect something more in favour of the decree-holder than the decree required.

Accepting then the view that the section relates only to decrees for the payment of money, a view sufficient for the purposes of the present appeal, their Lordships do not propose to deal with the other questions which arise on the

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construction of the section, merely observing that this is not to be taken as implying in any way an opinion adverse to that expressed in the Supreme Court in regard to them.

In order to preclude misconception, their Lordships think it right to observe that in the above they have been dealing only with the section as it exists in the Civil Procedure Code of Ceylon, and not with the corresponding section (s. 258) of the Indian Civil Procedure Code, now embodied in Order XXI., r. 2, of the First Schedule thereto. That rule has been repeatedly amended in some important respects, and it is not now in the same form as the Ceylon section. It has been the main subject discussed in more than a hundred cases in the various Courts of India with results which are by no means uniform. Their Lordships content themselves with saying that the conclusion at which they have arrived, namely, that s. 349 of the Ceylon Civil Procedure Code relates only to decrees for the payment of money, agrees not only with the opinion expressed in the judgment under appeal, but also with the judgments of several of the Courts in India pronounced before the words "of any kind" were added to the words "where any money payable under a decree."

In the result the appellant fails on all three of the points on which she relies. Their Lordships will humbly advise His Majesty to affirm the judgment appealed from, and to dismiss this appeal with costs.

Solicitor for appellant: *O. A. Cayley.*
Solicitors for respondent: *Freeman & Cooke.*

[PRIVY COUNCIL.]

J. C.*

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March 2.

AMBARD . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR TRINIDAD AND TOBAGO . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Appeal to Privy Council—Competency—Conviction of Contempt of Court—Penalty imposed by Court of Record—Jurisdiction of Judicial Committee to entertain Appeal—Public criticism of administration of justice—Rights and limitations applicable.

It is competent to His Majesty in Council to give leave to appeal, and to entertain appeals, against orders of Courts of Record overseas imposing penalties for contempt of Court. There is no reason for limiting in this respect the general prerogative of the Crown to review all judicial decisions of Courts of Record, whether civil or criminal, in the dominions overseas. Interferences with the administration of justice, whether they be interferences in particular civil or criminal cases, or take the form of attempts to depreciate the authority of the Courts themselves, when they amount to contempt of Court are quasi-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases, and leave to appeal against them should only be granted on the well-known principles on which leave to appeal in criminal cases is given [see *In re Dillet* (1887) 12 App. Cas. 459.]

Rainy v. *Justices of Sierra Leone* (1852–3) 8 Moo. P. C. 47, dissented from.

Surendranath Banerjea v. *Chief Justice and Judges of the High Court of Bengal* (1883) L. R. 10 I. A. 171, considered.

McLeod v. *St. Aubyn* [1899] A. C. 549, followed.

Whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises freely the ordinary right of criticizing temperately and fairly, in good faith, in private or in public, any episode in the administration of justice. Provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice, or attempting to impair the administration of justice, they are immune from proceedings for contempt of Court.

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* *Present:* LORD ATKIN, LORD MAUGHAM, and SIR SIDNEY ROWLATT.

Dicta of Lord Russell of Killowen C.J. in *Reg.* v. *Gray* [1900] 2 Q. B. 36, at p. 40, applied.

Order of the Supreme Court of Trinidad and Tobago set aside.

APPEAL (No. 46 of 1935), by special leave, from a judgment of the Supreme Court of Trinidad and Tobago (September 5, 1934), whereby the appellant, Andre Paul Terence Ambard, the editor-manager and part proprietor of the Port of Spain Gazette, was convicted of contempt of Court and ordered to pay a fine of 25*l.*, or in default to be imprisoned for one month.

The conviction was in respect of a leading article published in the Port of Spain Gazette on June 29, 1934, entitled "The Human Element," which criticized alleged inequality of sentences passed in Trinidad and Tobago for certain criminal offences.

The facts and the leading article in question appear from the judgment of the Judicial Committee.

The Supreme Court of Trinidad and Tobago (Belcher C.J., Gilchrist and Robinson JJ.) held that the article was written "with the direct object of bringing the administration of the criminal law in this Colony by the judges into disrepute and disregard," and they convicted the appellant and, as stated, ordered him to pay a fine of 25*l.*, or in default to be imprisoned for one month.

1936. Jan. 27. *Cave K.C.* and *Richard A. Willes* for the appellant. All that the appellant said in the article was that the two sentences were not those which ought to have been passed: there is no suggestion of bias or anything of the kind. The article is one which conveys the opinion, perhaps the uninstructed and wrong opinion of the writer, and the responsibility for it is accepted by the appellant. There is nothing in it, however, which comes anywhere near the length of the offence of scandalizing the Court. [Reference was made to *Reg.* v. *Gray* (1) and *McLeod* v. *St. Aubyn.* (2)]

Willes followed. The article was held to be contempt of Court because the Court which examined it reached the conclusion that it was untrue and malicious. That it was

(1) [1900] 2 Q. B. 36, 40.

(2) [1899] A. C. 549.

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untechnical must be admitted. The idea of securing equality and uniformity in criminal punishment has been and will be the subject of discussion by idealists for all time, and if an article has for its object the expression of a desire to attain this ideal, comment on the failure to attain it in existing Courts and judgments is comment which the Courts ought not to stop, and certainly is not conduct which ought to be treated as the crime of contempt. It is not contempt of Court to criticize the system with the object of improving it, even though, in emphasizing the conclusion drawn, illustrations, which are misguided or erroneous, are taken from existing decisions of the Court. This article was far from containing on its face any evidence of malice or ill-will towards the judge, and has a strong expression of the absence of such malice, although the writer does disclose an incorrect knowledge of criminal procedure.

Schiller K.C. and *Kenelm Preedy* for the respondent. The first question is how far this Board should interfere in cases where there is an order made by a Court of competent jurisdiction in a matter of contempt. The authorities on that question are not uniform, and the procedure seems to vary from time to time. The present is a matter which in its nature is a criminal contempt, and if it were being tried in this country there would be no appeal. In *Rainy* v. *Justices of Sierra Leone* (1) Lord Cranworth said (2): " In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. It is within the competency of the Court to impose fines for contempt; and, unless there exists a difference in the constitution of the Recorder's Court at Sierra Leone, the same power must be conceded to be inherent in that Court . . . . We do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders." The matter was also dealt with in *McDermott* v. *The Judges of British Guiana* (3), and the conclusions of the Board were given by Lord Chelmsford, who citing with approval from *Rainy's* case (1), said (4): " . . . .

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(1) (1852–3) 8 Moo. P. C. 47.
(2) Ibid. 54.
(3) (1868) L. R. 2 P. C. 341.
(4) Ibid. 362.

we are of opinion, that it is a Court of Record, and that the law must be considered the same there as in this country, and, therefore, that the Orders made by the Court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another Court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such Orders." Is it not a very important matter that the local Court should be allowed to judge what has constituted contempt, because they, knowing all the circumstances, are possibly the best judges of whether it constituted contempt or not. The Board ought to be very careful in exercising its jurisdiction to interfere. In *Surendranath Banerjea* v. *Chief Justice and Judges of the High Court of Bengal* (1) Sir Barnes Peacock said (2): "Their Lordships having decided that the libel was a contempt of Court, and that the High Court had jurisdiction to commit the petitioner for a period of two months, the case is not a proper one for an appeal to Her Majesty."

[LORD MACMILLAN. Does not that mean that it is a pure question of discretion?]

The Privy Council have laid down the ground upon which they will grant leave to appeal in pursuance of the prerogative, and they have confined it to cases where there is failure to regard the rules and the decision is contrary to natural justice. In the *Surendranath Banerjea* case (1), *Rainy's* case (3) was treated as an authority, and *Rainy's* case (3) has been cited many times without question, and no limitation has been put upon it.

[LORD ATKIN referred to the Order in Council in *McLeod* v. *St. Aubyn.* (4)]

There were very peculiar facts in that case. Assuming that there is jurisdiction, the Board ought to be very slow indeed to interfere with the local Court who know all the particulars and circumstances. They did think, from what had taken place in the Colony before, that this article was not as innocent as it appeared. The judges are saying: "You are criticising

(1) (1883) L. R. 10 I. A. 171.
(2) Ibid. 179.
(3) 8 Moo P. C. 47.
(4) [1899] A. C. 549.

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us for the unfair administration of justice," and if that is so, it is contempt of Court. Because the Court of trial on a criminal matter has come to a conclusion different from that at which this Board might arrive, that is not enough to entitle the Board to entertain an appeal from it: *In re Dillet* (1) and *Arnold* v. *The King-Emperor* (2), where the principle was re-stated.

Cave K.C. replied. On the question of jurisdiction, the position with regard to appeals of this description is that the Crown has the prerogative of ordering that any judgment of any Court of the Colonies shall be reviewed by way of appeal, subject to the one qualification that if that prerogative has been expressly taken away by statute the rule no longer applies: *Reg.* v. *Bertrand.* (3) There is no suggestion here that there has been a curtailing of the prerogative of the Crown in Trinidad and Tobago. *Rainy* v. *Justices of Sierra Leone* (4) and *McDermott* v. *Chief Justice and Judges of British Guiana* (5) are the only authorities which on the face of them appear to be against the appellant, and they were both cited before the Board when special leave to appeal was given.

Lord Atkin. We are of opinion that there is jurisdiction in the Board to hear the appeal.

March 2. The judgment of their Lordships was delivered by

Lord Atkin. This is an appeal, by special leave, from an order of the Supreme Court of Trinidad and Tobago ordering the appellant to pay a fine of 25*l.*, or in default to be imprisoned for one month, for contempt of Court, and further ordering him to pay the costs of the proceedings as between solicitor and client.

The first question that arises is whether, as contended by the respondent, the Privy Council is incompetent to entertain an appeal from an order of a Court of Record inflicting a penalty for contempt of Court. The decisions on the point are conflicting. In *Rainy* v. *Justices of Sierra Leone* (4) a

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(1) (1887) 12 App. Cas. 459, 467.
(2) [1914] A. C. 644.
(3) (1867) L. R. 1 P. C. 520, 529.
(4) 8 Moo. P. C. 47.
(5) (1868) L. R. 2 P. C. 341.

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Board consisting of Lord Cranworth, Knight Bruce L.J., Dr. Lushington, and Sir Edward Ryan undoubtedly decided that no such appeal lay. Lord Cranworth, in giving the judgment of the Board, after pointing out that in this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court, proceeded (1): "We are of opinion, that it is a Court of Record, and that the law must be considered the same there as in this country; and, therefore, that the orders made by the Court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another Court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders."

The argument, with respect, is not convincing, for it would seem to apply equally to all decisions in criminal cases which at that time in both this country and the colony were conclusive and could not be questioned by any Court. In *McDermott* v. *The Judges of British Guiana* (2) leave to appeal from a committal for contempt had been given "without prejudice to the competency of Her Majesty to entertain an appeal." At the hearing the Board, consisting of Lord Chelmsford, Wood L.J., Sir James Colvile, and Sir E. Vaughan Williams, treated the hearing as a motion to revoke the leave. An incidental question was whether the Court which imposed the penalty was a Court of Record, and in giving the judgment of the Board Lord Chelmsford said that the applicant had to show either that the Court was not a Court of Record, or that, if it was, yet there was something in the order which rendered it improper, and therefore the subject of appeal. He proceeded to say (3): "Not a single case is to be found where there has been a committal by one of the Colonial Courts for contempt, where it appeared clearly upon the face of the Order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an Order of this description."

(1) 8 Moo. P. C. 54.

(2) (1868) L. R. 2 P. C. 341.

(3) Ibid. 363.

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It would appear to their Lordships that the grounds of decision assume that jurisdiction exists, at any rate, in cases where it does not appear on the face of the order that the party had committed a contempt, etc. Whether this means that if the order merely recited that a contempt had been committed, without more, the Board would examine the alleged contempt, is not clear. But in *Surendranath Banerjea* v. *Chief Justice and Judges of the High Court of Bengal* (1) on an appeal from a committal for contempt by the High Court in Calcutta, the Board examined the written article which was complained of and said that it was clearly a contempt of Court. They set out the passage from *McDermott's* case (2), which has just been quoted, and proceed (3): "Their Lordships having decided that the libel was a contempt of Court, and that the High Court had jurisdiction to commit the petitioner for a period of two months, the case is not a proper one for an appeal to Her Majesty." This decision is difficult to reconcile with the doctrine that found favour in *Rainy's* case (4), that the Colonial Court is sole judge of what constitutes a contempt, and that there is no remedy by way of appeal to His Majesty in Council to review the propriety of such orders.

However, in 1899, in the case of *McLeod* v. *St. Aubyn* (5), the Judicial Committee entertained an appeal from an order committing for contempt, and allowed the appeal with costs against the respondent. The point that there was no jurisdiction to entertain such an appeal was not taken, but it seems unlikely that if it were a good point it should not have occurred to counsel, or to any of the members of the Board before whom the case came at different stages. Their Lordships have sent for the record in that case, and they find that it first came before a Board consisting of Lord Hobhouse, Lord Macnaghten, Lord Morris, and Sir Richard Couch, on an ex parte petition for leave to appeal, when leave was given. It then came before a Board consisting of Lord Watson, Lord Davey, and Sir Richard Couch, on a petition to proceed in forma pauperis, which was granted. The appeal was finally heard and determined and allowed by a Board consisting of Lord Watson, Lord Macnaghten, Lord Morris, and Lord Davey. The Board in that case quite plainly assumed jurisdiction, and their Lordships respectfully agree with their view. There seems no reason for limiting in this respect the general prerogative of the Crown to review all judicial decisions of Courts of Record in the dominions overseas, whether civil or criminal: though the discretion as to the exercise of the prerogative may have to be very carefully guarded. It should be noticed that the Order in Council of 1909 dealing with the jurisdiction of the Supreme Court of Trinidad and Tobago, St. R. & O. 1909, p. 854, imposes no limit other than pecuniary as to the orders, decisions, etc., of the Supreme Court from which there may be an appeal, and it would appear from it that the Supreme Court itself could have granted leave to appeal to the Privy Council from this order in the present case. Apart from any question of this kind, however, their Lordships come clearly to the conclusion that it is competent to His Majesty in Council to give leave to appeal, and to entertain appeals, against orders of the Courts overseas imposing penalties for contempt of Court. In such cases the discretionary power of the Board will, no doubt, be exercised with great care. Everyone will recognize the importance of maintaining the authority of the Courts in restraining and punishing interferences with the administration of justice, whether they be interferences in particular civil or criminal cases, or take the form of attempts to depreciate the authority of the Courts themselves. It is sufficient to say that such interferences, when they amount to contempt of Court, are quasi-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases, and leave to appeal against them should only be granted on the well-known principles on which leave to appeal in criminal cases is given.

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(1) (1883) L. R. 10 I. A. 171.
(2) L. R. 2 P. C. 363.
(3) L. R. 10 I. A. 179.
(4) 8 Moo. P. C. 47.
(5) [1899] A. C. 549.

On these principles their Lordships proceed to examine the complaint made in this case. In June, 1934, one, Joseph St. Clair, was charged at the Sessions, Port of Spain, before Gilchrist J. and a jury on an indictment containing two counts, one charging the accused with attempt to murder a superior officer, the second with shooting with intent to do grievous bodily harm. It appears that the accused fired his rifle at the officer but failed to hit him. He was found guilty on the second count, with a recommendation to mercy, and was sentenced on June 12 to eight years' hard labour. He did not appeal.

At the same sessions, one, John Sheriff, was charged before Robinson J. and a jury on an indictment containing three counts, (1.) wounding with intent to murder a particular woman, (2.) wounding with intent to murder generally, (3.) wounding with intent to do grievous bodily harm. It appears that he attacked with a razor, and seriously mutilated, a woman who was not the person he had intended to attack. He was convicted on the third count, and was sentenced on June 14 to seven years' hard labour. After sentence he said: "I give notice of appeal," and on June 20 filed formal notice of appeal against his conviction. His appeal eventually succeeded, apparently on the ground of misdirection, and the conviction was quashed. Meanwhile, on June 29, the present appellant, who is the editor-manager and part proprietor of a daily newspaper called the Port of Spain Gazette, published the article which has been found to constitute a contempt of Court. He did not write it, but revised it editorially before publication, and undoubtedly is fully responsible for its publication. It is necessary for the purposes of this case to consider the whole article. It was as follows:—

"THE HUMAN ELEMENT.

"Many years ago, it used to be a rather interesting feature of one of the English publications to draw pointed attention, in parallel columns to the strangely anomalous differences between the sentences imposed by various magistrates and judges in cases which seemed, from the reports, to present a fair similarity of facts. In some quarters, the criticism—often unexpressed in actual words—was resented as taking no account of circumstances which a judge was fully entitled to give effect to, though they might not strike the ordinary

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reader of the press reports. But on the whole, it was felt that, in the majority of instances, useful public service was rendered by this showing up of the inequalities of legal punishments. In Trinidad it must often have occurred to readers of the proceedings in our criminal courts, both inferior and superior, how greatly the personal or human element seems to come into play in awarding punishment for offences. No question is here involved as to the justification for the convictions ; it is assumed, and we believe it to be no unjustified assumption, that in the great majority of cases accused persons are seldom convicted except upon thoroughly satisfactory evidence ; and a small number of appeals which succeed, when based upon the plea of the innocence of the prisoner of the offence charged, may be regarded as sufficient proof of that. It is the inequality of the sentences as fitting the circumstances of the offences that seems to often demand some comment. And if we here venture to draw attention to this, it is not by any means with the idea of confirming popular opinion as to the inherent severity or leniency of individual judges or magistrates, but simply with a view to inviting consideration of a matter that must, and in fact does, cause adverse comment amongst the masses as to the evenness of the administration of justice in Trinidad. In two recent cases has it been thought by the public that the sentences imposed by two different judges have been open to such criticism. In the one case, a man stood indicted for the seriously grave offence of shooting at his superior officer with intent to murder him. There seems no doubt that had it not been for the prisoner's failure to shoot straight—a thing at which he himself marvelled openly—he must have killed the officer. No doubt, as was brought out in evidence (and perhaps to an even greater degree than was proved), the man was suffering under the effects of constant provocation ; but in addition to all else, there was this to aggravate the crime, that the offender was a trained member of a military body, presumably well disciplined, and that to have used a lethal weapon to which his position gave him easy access and with it to have attempted the murder of his officer is a thing regarded in most quarters as peculiarly heinous.

The sentence imposed on conviction was eight years, which, on the assumption of good conduct, means release at the end of six years. The other case was one in which a man stood charged with a peculiarly brutal act of wounding with a razor, his victim, a woman who was shortly to have become a mother, being so terribly injured that for a long time it seemed quite probable she would die. On conviction, the sentence imposed by another judge on this prisoner was seven years, which, on the assumption of good conduct, means release at the expiration of five years and a quarter. Had either of these two cases stood alone, it is quite likely that the sentences would have passed uncommented upon ; for neither of them is, in itself, what might be described as a lenient one. But coming together as they did at the same sessions and within a day or two of each other, they have created in the public mind an impression that the former was as unduly severe as the latter was lenient. Both, it is true, were for attempted murder. In both cases a deadly weapon was used. And while some may think that, as we stated above, the military relationship between the prisoner and his intended victim in the first case rendered the matter graver from an official viewpoint, yet, on the other hand, in the shooting case, no one, providentially, was injured, and much provocation was proved, whereas in the razor slashing case, (assuming the facts proved by the Crown to be true), there does not appear to have been any provocation, while, on the contrary, the attack was made on a woman unknown to or by the accused, whom he mistook for someone else. Surely there might have been expected rather more effect to have been given to the recommendation from the jury to mercy in the first case ; and surely, in the other, it would have been more in accord with public opinion as to the need for stern suppression of such attacks had the learned judge been able to see his way to impose a considerably more severe term of imprisonment ; the more so in view of the fact that there was absolutely no intimation from the jury that they thought any leniency might properly be shown. We fully realise that the infliction of the sentence is entirely in the discretion of judge, who has a wide latitude, from a few days to life-long imprisonment for the crime of attempted murder. But equally is it usually expected that the fullest consideration will be given to the recommendation of a jury for mercy. Assuming, therefore, that eight years' hard labour in lieu of the 20 years which many persons fully expected would be passed, fairly represents an effectual concession to the jury's views, the opinion has been fully expressed that the seven years passed on the razor slasher was far too little for the crime he had committed. And we do not think we are wrong in saying that, as a rule, some weight is given by judges to the question of whether a prisoner succeeded or failed in committing the crime he stands charged with. As we have pointed out, though in both of these cases, the Crown alleged and the jury found, an attempt to murder, in the one case that attempt failed completely—through no fault of the prisoner, it is true: in the other the attempt, while providentially failing, resulted in terrible mutilation of the woman who was the victim. It is painful at all times to have to urge the insufficiency of a punishment inflicted; and we wish it to be distinctly appreciated that we dissociate ourselves from those who regard one judge as habitually severe or another as habitually lenient. Yet we do think that if some way could be devised for the greater equalisation of punishment with the crime committed, a great deal would have been achieved towards the removal of one frequent cause for criticism of the sentences passed in our various criminal courts."

On July 3 the Attorney-General gave notice of motion to the Registrar of the Supreme Court that he would move for an order nisi calling upon the appellant to show cause why a writ of attachment should not issue against him for his contempt in publishing the article in question, and on the same date an order nisi was made by the Court in the terms of the notice of motion. The notice and the order nisi were at first limited to contempt in publishing an article calculated to interfere with the due course of justice, the complaint being that it was improper having regard to Sheriff's pending appeal. Later, it was amended so as to include a complaint

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that the article contained "statements and comments which tend to bring the authority and administration of the law into disrepute and disregard." In this amended form the matter came before the full Court consisting of the Chief Justice and Gilchrist and Robinson JJ. It was heard on various days in July, and on September 5 the Chief Justice gave the judgment of the Court. He acquitted the appellant of contempt in respect of the pending appeal of Sheriff: and no more need be said on that point. But he found that the article was written with the direct object of bringing the administration of the criminal law by the judges into disfavour with the public, and desiring to impose a penalty which, if relatively light, would yet emphasize that, while the judges would place no obstruction in the way of fair criticism of their performance of their functions, untruths and malice would not be tolerated, he fined the respondent 25*l.*, in default, one month's imprisonment, and ordered him to pay the costs of the proceedings to be taxed between solicitor and client. The formal judgment, slightly departing from the wording of the oral judgment, recited that the appellant had committed a contempt of Court, the article having been written "with the direct object of bringing the administration of the criminal law in this Colony by the judges into disrepute and disregard," so following the amended order nisi.

Their Lordships can find no evidence in the article, or in any facts placed before the Court, to justify the finding either that the article was written with the direct object mentioned, or that it could have that effect: and they will advise His Majesty that this appeal be allowed. It will be sufficient to apply the law as laid down in *Reg.* v. *Gray* (1) by Lord Russell of Killowen C.J. (2): "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to

(1) [1900] 2 Q. B. 36.
(2) Ibid. 40.

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the category which Lord Hardwicke L.C. characterised as 'scandalising a Court or a judge.' (*In re Read and Huggonson* (1).) That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court."

And that, in applying the law, the Board will not lose sight of local conditions, is made clear in the judgment in *McLeod* v. *St. Aubyn* (2), where Lord Morris, after saying that committals for contempt of Court by scandalizing the Court itself had become obsolete in this country, an observation sadly disproved the next year in the case last cited, proceeds (3): " Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court."

But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

In the present case the writer had taken for his theme the perennial topic of inequality of sentences, under the text "The Human Element," using as the occasion for his article the two sentences referred to. He expressly disclaimed the suggestion that one of the particular judges was habitually severe, the other habitually lenient. It is unnecessary to discuss whether his criticism of the sentences was well founded. It is very seldom that the observer has the means of ascertaining all the circumstances which weigh with an experienced judge in awarding sentence. Sentences are unequal because the conditions in which offences are committed are unequal. The writer is, however, perfectly justified in pointing out, what is obvious, that sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is quite inevitable. Some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; others equally conscientious have thought it their duty to view the same crimes with leniency. If to say that the human element enters into the awarding of punishment be contempt of Court it is to be feared that few in or out of the profession would escape. If the writer had, as journalist, said that St. Clair's sentence was, in his opinion, too severe: and on another occasion that Sheriff's sentence was too lenient, no complaint could possibly be made: and the offence does not become apparent when the two are contrasted. The writer in seeking his remedy, as has been remarked by the Supreme Court, has ignored the Court of Criminal Appeal: but he might reply that till such a Court has power, on the initiative of the prosecution, to increase too lenient sentences, its effect in standardising sentences is not completely adequate. It appears to their Lordships that the writer receives less than justice from the Supreme Court in having untruths imputed to him as a ground for finding the article to be in contempt of Court. He has correctly stated both offenders to have been charged with intent to murder: and though he has subsequently inaccurately stated that the conviction of both affirmed that intent, yet seeing that both were convicted of the same intent—namely, to do grievous bodily harm, the

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(1) (1742) 2 Atk. 469.
(2) [1899] A. C. 549.
(3) Ibid. 561.

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reasoning as to unevenness of sentence appears to have been unaffected. And it seems of little moment that the writer thought that this sentence might be for life instead of in fact being for 15 years. If criticism of decisions could only safely be made by persons who accurately knew the relevant law, who would be protected? There is no suggestion that the law was intentionally mis-stated.

Their Lordships have discussed this case at some length because, in one aspect, it concerns the liberty of the Press, which is no more than the liberty of any member of the public, to criticise temperately and fairly, but freely, any episode in the administration of justice. They have come to the conclusion that there is no evidence upon which the Court could find that the appellant has exceeded this right, or that he acted with untruth or malice, or with the direct object of bringing the administration of justice into disrepute. They are satisfied that the Supreme Court took the course they did with a desire to uphold the dignity and authority of the law as administered in Trinidad; there nevertheless seems to their Lordships to have been a misconception of the doctrine of contempt of Court as applied to public criticism. A jurisdiction of a very necessary and useful kind was applied in a case to which it was not properly applicable, and this, in the view of their Lordships, has resulted in a substantial miscarriage of justice. Acting, therefore, on the principles enumerated in the first part of this judgment as applicable to appeals from convictions for contempt of Court, their Lordships will humbly advise His Majesty that this appeal be allowed, and that the order of the Supreme Court, dated September 5, 1934, be set aside. The respondent must pay the costs here and in the Court below.

Solicitors for appellant: *Maples, Teesdale & Co.*
Solicitors for respondent: *Burchells.*

[PRIVY COUNCIL.]

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ATTYGALLE AND ANOTHER . . . . . PETITIONERS;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Ceylon—Practice—Criminal charge—Facts especially within knowledge of accused—Onus of proof not on accused—Ceylon Evidence Ordinance, No. 14 *of* 1895, *s.* 106—*Principles applicable to the granting of special leave to appeal in criminal cases.*

The Ceylon Evidence Ordinance, No. 14 of 1895, provides by s. 106 that: " When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

At the trial of two persons accused respectively of performing an illegal operation and of abetting its performance, the judge in the course of his summing-up, after stating that the person on whom the operation was alleged to have been performed was at the time unconscious under chloroform, and that what took place was a fact especially within the knowledge of the accused who were there, directed the jury that the law said that the burden of proving that no criminal operation took place was upon the accused:—

Held, that that direction did not correctly state the law. It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed.

The facts of the case were such, however, as to point irresistibly to the guilt of the accused quite independently of that direction to the jury, and there had been no such substantial injustice, no such deprivation of the substance of fair trial, as to justify the grant of special leave to appeal to his Majesty in Council.

Observations of Lord Sumner in *Ibrahim* v. *The King* [1914] A. C. 599, at p. 615, applied.

Petition dismissed.

PETITION for special leave to appeal from a judgment of the Supreme Court of the Island of Ceylon (August 28, 1934) whereby the first petitioner, Dr. J. W. S. Attygalle, was convicted under s. 303 of the Ceylon Penal Code of voluntarily and illegally causing one C. M. Maye, then with child, to miscarry on April 22, 1934, and was sentenced to eighteen months' simple imprisonment; and whereby the second petitioner, C. E. Fonseka, a civil engineer, was convicted under ss. 303 and 102 of the Ceylon Penal Code of abetting the commission of the above offence, and thereby causing the same, and was sentenced to eighteen months' rigorous imprisonment.

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* *Present:* VISCOUNT HAILSHAM L.C., LORD MAUGHAM, and SIR SIDNEY ROWLATT.

The petitioners contended (inter alia) that the judge completely misdirected the jury as to the onus of proof, in that, after referring to s. 106 of the Ceylon Evidence Ordinance, No. 14 of 1895, which provides that " when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him," directed the jury that the burden was on the accused of proving that they had not committed the offence charged against them, they being the only persons present when the alleged offence took place.

1936. March 26. *Hallett K.C.*, *L. M. D. de Silva* (K.C. Ceylon), and *Stephen Chapman* for the petitioners. The three main grounds in support of the petition are: (1.) the judge in the course of his summing-up directed the jury that the burden of proving that no criminal operation had taken place was on the two accused; (2.) after the first petitioner had given evidence on his own behalf, the judge in his summing-up directed the jury that that evidence could be discredited by means of a document which was a record of a statement alleged to have been made by the first petitioner to a Police Officer, the correctness of which was not admitted by the first petitioner, nor proved by the evidence of any other person: (3.) in the course of the summing-up pressure was brought to bear upon the jury to bring a verdict of at least five to two by an observation which the judge made that if they were unable to do so they would have to go through the whole case all over again. In *Woolmington* v. *Director of Public Prosecutions* (1) it was said (2): " But while the prosecution must prove the guilt of the prisoner, there is no such burden laid

(1) [1935] A. C. 462.
(2) Ibid. 481.

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on the prisoner to prove his innocence. . . . . Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. . . . . " The Ceylon Evidence Ordinance, as the Indian Evidence Act, incorporates the fundamental rules of evidence taken over from the English law, and s. 106 is not to be construed as contravening any fundamental principle of English law. In Taylor on Evidence, 11th ed., vol. i, s. 376, at p. 284, it is said: " The burthen of proof lies on the party who substantially alleges the affirmative. The exception is this, that where the subject matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour." In view of *Woolmington's* case (1) that exception is no longer applicable to such a case as the present. Reference was also made to the Ceylon Criminal Procedure Code, No. 15 of 1898, c. 12 [Vol. 4 of the Ordinances, 200].] Special leave to appeal ought to be granted.

Kenelm Preedy for the respondent, referred to the particular facts and circumstances of the case in support of his contention that in any event the case was not one in which His Majesty would grant special leave to appeal. [Reference was made to *In re Dillet* (2) and to *King* v. *Cooray*. (3)]

March 26. The judgment of their Lordships was delivered by

VISCOUNT HAILSHAM L.C. This is a case which has given their Lordships considerable trouble. The prosecution was against the first accused for performing an illegal operation, and against the second accused for abetting him in that crime.

At the trial the learned judge gave a direction to the jury, to which exception has been taken by Mr. de Silva in a very clear and helpful argument, and in which the learned judge explained to the jury his view as to the burden of proof based upon his construction of s. 106 of Ordinance No. 14 of 1895 in the Ceylon Code. That section enacts that when any fact is

(1) [1935] A. C. 462.
(2) (1887) 12 App. Cas. 459.
(3) (1928) 28 Ceylon N. L. R. 74.

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especially within the knowledge of any person, the burden of proving that fact is upon him. With reference to that section the learned judge told the jury that: " There is a section of the Evidence Ordinance which, I think, is really the basis of circumstantial evidence so far as it occurs in Ceylon; that section says when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Miss Maye "—that is the person upon whom the operation was alleged to have been performed—" was unconscious and what took place in that room that three-quarters of an hour that she was under chloroform is a fact especially within the knowledge of these two accused who were there. The burden of proving that fact, the law says is upon them, namely, that no criminal operation took place, but that what took place was this speculum examination."

Their Lordships are of opinion that that direction does not correctly state the law. It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. The jury might well have thought from the passage just quoted that that was in fact a burden which the accused person had to discharge.

The summing-up goes on to explain the presumption of innocence in favour of accused persons, but it again reiterates that the burden of proving that no criminal operation took place is on the two accused who were there.

If their Lordships thought that the refusal of leave to appeal in this case could be construed as an acceptance of that doctrine, they would be very slow to reject the petition which has been brought before them. But, in fact, the circumstances of the case have been explained to their Lordships, and they are satisfied that, on the facts that were explained here, there were circumstances pointing irresistibly to the guilt of the accused quite independently of this direction.

It has been repeatedly stated in a series of authorities that their Lordships do not sit as a Court of Criminal Appeal; that the mere fact that there has been some mistake of law does not afford sufficient ground of itself for granting special leave to appeal. Lord Sumner in a well known passage in the case of *Ibrahim* v. *The King* (1) pointed out that (2) "misdirection, as such, even irregularity as such, will not suffice. . . . . There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future."

The latter danger, it is hoped, is sufficiently guarded against by the observations which their Lordships have thought it right to make. It has been suggested by Mr. de Silva that the judgment in the recent case of *Lawrence* v. *The King* (3) in some way modified or altered that statement of the law. *Lawrence* v. *The King* (3) is a case in which the actual decision was plainly within the authority of previous cases, because their Lordships held that sentences had been pronounced which were outside the power of the tribunal which purported to pronounce them. It may be that the precise language of the judgment may have to be considered on a more suitable occasion. It is sufficient to say that the judgment then pronounced did not purport to depart in any way from the well settled principles which have been laid down in previous authorities, and cannot be allowed to be construed so as to depart from those principles.

In all the circumstances of this case their Lordships do not feel justified in humbly advising His Majesty to grant special leave to appeal, because they are satisfied that there has been no such substantial injustice, no such deprivation of the substance of fair trial, as the cases show to be necessary in order to justify the granting of such leave. At the same time, their Lordships want to make it clear that that refusal does not imply an endorsement of some of the language of the summing-up, language which, perhaps, would not seem quite so unfavourable to the accused if it is taken as a whole and not divorced from the context in which it appears. But, as stated in the passages to which attention has been called, the statement of the law is incorrect, and nothing that has happened

(1) [1914] A. C. 599.
(2) Ibid. 615.
(3) [1933] A. C. 699.

on this petition must be understood as affording any approval of its language.

Their Lordships will accordingly humbly advise His Majesty that the petition be refused.

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Solicitors for petitioners: *Freeman & Cooke.*
Solicitors for respondent: *Burchells.*

[PRIVY COUNCIL.]

METROPOLITAN COAL COMPANY, LIMITED . . . . APPELLANTS;

AND

PYE . . . . RESPONDENT.

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ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Workmen's compensation—Industrial disease—Pulmonary fibrosis—Due to inhalation of dust in coal-mine—Whether caused by silica dust—Onus of proof—Construction of Statute—Coal-miner unprotected if disease due to silica dust—New South Wales Workers' Compensation Act, 1926–1929 (*Geo.* 5, *No.* 15 *of* 1926—*No.* 36 *of* 1929), *s.* 5; *s.* 6, *sub-s.* 1; *s.* 7, *sub-s.* 1—*Workmen's Compensation* (*Silicosis*) *Act,* 1920 (*Geo.* 5, *No.* 13 *of* 1920).

Sect. 7, sub-s. 1, of the New South Wales Workers' Compensation Act, 1926–29, provides for the payment of compensation by his employer to a workman who has received an injury, and by s. 6, sub-s. 1, "injury" means "personal injury arising out of and in the course of the employment and includes a disease so arising whether of sudden onset or of such a nature as to be contracted by gradual process other than a disease caused by silica dust."

The Workmen's Compensation (Silicosis) Act, 1920, as amended, provides for the payment of compensation by the employers of workmen in specified industries and processes involving exposure to silica dust who suffer death or total or partial disablement from diseases of the pulmonary or respiratory organs caused by exposure to silica dust. "Coal-mining" is not included in the industries or processes so specified.

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* *Present:* VISCOUNT HAILSHAM L.C., LORD THANKERTON, LORD MAUGHAM, SIR GEORGE LOWNDES, and SIR SIDNEY ROWLATT.

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The respondent, who was employed by the appellants as a miner in one of their coal-mines, became partially incapacitated for work owing to pulmonary fibrosis resulting from the inhalation of dust in the coal-mine. The Workers' Compensation Commission before whom his claim for compensation came, and who were not satisfied that the partial incapacity for work resulted from a disease caused by silica dust, awarded him compensation as for partial incapacity. On a case stated at the request of the appellants :—

Held, that the respondent was entitled to compensation. The intention of the Workers' Compensation Act is, as appears from s. 6, sub-s. 1, to provide for compensation in every case of injury, including disease, arising out of and in the course of a workman's employment, and to give effect to the Act the words "other than a disease caused by silica dust" must be read as inserted not to limit the Act, but to prevent it being appealed to in particular circumstances where the relief would overlap that provided by a special and narrower scheme. Till such overlapping appears its operation is unaffected. To hold otherwise would have the result that where the medical evidence showed that the disease was due to dust but could not specify the kind of dust, the workman would be left without any compensation at all though undoubtedly suffering from a disease arising out of and in the course of his employment.

Coal-mining not being an industry brought within the operation of the Act dealing with silicosis, if disease in a coal-miner is affirmatively proved to be due to silica dust the workman is left unprotected, for in such case he would not come within either the Workers' Compensation Act or the Workmen's Compensation (Silicosis) Act.

Order of the High Court of Australia [1934] 50 C. L. R. 614, affirmed.

APPEAL (No. 18 of 1935), by special leave, from an order of the High Court of Australia (May 14, 1934), reversing an order of the Supreme Court of New South Wales (December 11, 1933) on a case stated under the provisions of the New South Wales Workers' Compensation Act, 1926–1929.

Sect. 6, sub-s. 1, of the Workers' Compensation Act, 1926–1929, of New South Wales enacts that ". . . . 'injury' means personal injury arising out of and in the course of the employment and includes a disease so arising whether of sudden onset or of such a nature as to be contracted by gradual process other than a disease caused by silica dust."

The appellants, Metropolitan Coal Company, Ld., own and work coal-mines in New South Wales. The respondent, Jacob Pye, was formerly employed by them as a miner in one of their coal-mines. On March 6, 1933, he filed an application for compensation, which was heard by the Workers' Compensation Commission on May 12, 1933. After hearing medical evidence the Commission found that the respondent was partially incapacitated for work owing to pulmonary fibrosis which resulted from the inhalation of dust in the coal-mine of the appellants; that his employment with the appellants was employment to the nature of which the disease was due; that on the evidence before it the Commission was not satisfied that the partial incapacity for work resulted from a disease caused by silica dust. They awarded the respondent compensation of 35*s*. a week, and at the request of the appellants stated a case for the opinion of the Supreme Court of New South Wales.

The following, among other questions, was stated for the opinion of the Supreme Court: "Did the Commission err in law in holding:—(*b*) that it was unnecessary for the applicant [the present respondent] to allege in his filed application for determination that his disabling disease did not come within the exception to the definition of 'injury,' or to prove that such disease was not one which came within such exception, 'a disease caused by silica dust'?"

The Supreme Court of New South Wales (James and Halse Rogers JJ., Harvey A.C.J. dissenting) answered the question in the affirmative, and entered judgment for the appellant company.

On appeal, the High Court of Australia (Rich, Evatt, and McTiernan JJ., Gavan Duffy C.J. and Starke J. dissenting) reversed the decision of the Supreme Court of New South Wales, and answered the question in the negative, holding that the onus was not upon the respondent to prove that his disease was not one caused by silica dust. The appeal is reported at [1934] 50 C. L. R. 614.

1936. March 6. *Macaskie K.C.* and *Valentine Holmes* for the appellants. The question involved in this appeal is whether an applicant for compensation under the Workers' Compensation

Act, 1926–1929, of New South Wales, must, in order to bring himself within the Act, (*a*) allege in his application, and (*b*) prove, that he has contracted a disease other than a disease caused by silica dust, or whether it is sufficient to establish his right to compensation if he alleges and proves that he has contracted a disease arising out of and in the course of his employment, without alleging or proving that the disease was not caused by silica dust. That question arises on the construction of the definition clause in s. 6, sub-s. 1, of the Workers' Compensation Act. [Sects. 7, sub-s. 1; 6, sub-s. 1; and 5 were read; and the Workmen's Compensation (Silicosis) Act, 1920, as amended, was referred to.] If the burden were upon the respondent to prove that he was not suffering from a disease caused by silica dust the finding of the Workers' Compensation Commission that they were not satisfied that the partial incapacity for work resulted from a disease caused by silica dust would seem to put him out of Court.

[LORD MAUGHAM. He would be equally out of Court if he applied under the Silicosis Act of 1920.]

That would appear to be the dilemma; he could not apply under the Silicosis Act because coal-mining was not scheduled as one of the silicosis industries. In s. 7, sub-s. 3, there is a typical case of a proviso which qualifies the right of the worker to compensation, but the qualification is introduced expressly as a proviso. Had the Legislature intended to treat the words "other than a disease caused by silica dust" merely as a proviso, and not as an exception qualifying and limiting the area of the injury, it would have been perfectly easy for the Legislature to have done what they did in sub-s. 3 of s. 7, and have introduced this proviso, if it were intended to be one, in s. 7, sub-s. 3. In construing this Act one is not entitled to look outside to see whether deserving cases not covered by this Act are covered by other Acts. The history of the legislation has nothing to do with the construction of this definition. Where in a definition clause there are words of exception, those words must be read with all the words of the definition into which they are introduced, and the words of exception cannot be treated merely as a proviso. Having this definition of

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" injury " down to the word " process," the onus would be on the workman to prove that the injury or disease arose out of and in the course of the employment : so the respondent has to satisfy the Board that the remaining words, " other than a disease caused by silica dust," are of a different category, and that the onus after that is suddenly shifted to the employer to set up that the disease of which the workman complains is one caused by silica dust. There is nothing in the wording of the definition to suggest that any one part of it should be treated differently, or that the onus should be changed. These are words of exception which qualify the words of the definition which have gone before and have to be read with those words of definition, and cannot be treated as independent of them : *Rex* v. *James*. (1) The words " other than a disease caused by silica dust " are incorporated, in the words of Lord Alverstone C.J. in *Rex* v. *James* (2), " directly or by reference with the enacting clause "—being this definition section of what is the limit and area of injury—" so that the enacting clause cannot be read without the qualification introduced by the exception." It follows that the respondent has to satisfy the Court that his disease is not one caused by silica dust. [Reference was made to the dicta of Greer L.J. on onus of proof in *Bailey, R. O.* v. *Potteries Electric Traction Co.* (3)] *Rex* v. *James* (1) suggested that some distinction might exist between an exception and a proviso ; it certainly did exist in the old books on pleading, but whether it is called an exception or a proviso it is the substance that must be looked at to see what the words really mean, and if it is found that they create a limitation on the more general words which come before, then the general words are cut down by those additional words, and it therefore falls on whoever relies on this definition to show that he comes within the qualifying meaning created by these last few words. [On the point of onus of proof being on the workman reference was made to *Taylor* v. *Humphries* (4) and *Stoney* v. *Eastbourne Rural Council*. (5)] The position here

(1) [1902] 1 K. B. 540.
(2) Ibid. 545.
(3) [1931] 1 K. B. 385, at p. 517.
(4) (1864) 17 C. B. (N. S.) 539.
(5) [1927] 1 Ch. 367, at p. 376.

is very similar to that envisaged by Bailhache J. in *Munro, Brice & Co.* v. *War Risks Association.* (1) The workman has to show that his claim does not arise in respect of a disease caused by silica dust.

Cave K.C. and *W. Shakespeare* for the respondent. The object and effect of the last eight words of this definition is merely to preclude the workman from declaring on a disease caused by silica dust—that and nothing more. It does not prevent him from declaring on a disease which is, in the words of the definition, " of sudden onset," or " contracted by gradual process," whether such a disease be the result of a liquid, a poison or dust, or is caused by other means. It prevents him from declaring on a silica dust disease because he is supposed to have his remedy elsewhere. The definition includes all the diseases referred to in Willis's Workmen's Compensation, 29th ed., at p. 558, and more. As long as the workman is able to put forward a case showing that he is suffering from one of those diseases he is not harmed by the presence of the proviso. But the employer is entitled to say : " You are not entitled to recover in respect of this disease because I propose to show that it was caused by silica dust." [Reference was made to *Cooper* v. *General Accident Assurance Corporation* (2), and *Motor Union Insurance Co.* v. *Boggan* (3) ; and to Welford and Otter-Barry's Fire Insurance, 3rd ed., at p. 125.] It was not necessary for the respondent to prove that the disease was not caused by silica dust, and the appeal should be dismissed.

Macaskie K.C. replied.

March 27. The judgment of their Lordships was delivered by

SIR SIDNEY ROWLATT. This is an appeal from a decision of the High Court of Australia reversing a decision of the Supreme Court of New South Wales on a case stated under the provisions of the Workers' Compensation Act, 1926–1929, s. 37, sub-s. 4, at the request of the appellant company, by the Workers' Compensation Commission of New South Wales.

The only question for determination is whether an applicant for compensation under the Act must, in order to establish his claim, not only prove that he has contracted a disease arising out of and in the course of his employment, but go on to prove that it was not caused by silica dust (in which case the employer would not be liable) or whether it suffices for him to prove the first proposition only, leaving it to the employer to show, if he can, that the disease was due to silica dust. It is a short though important question of construction relating to the onus of proof.

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(1) [1918] 2 K. B. 78, at pp. 81–2.

(2) [1922] 2 Ir. R. 38.

(3) [1923] 2 Ir. R. 136.

The directly relevant sections are as follows :—

" Section 7 (I.).—A worker who has received an injury whether at or away from his place of employment (and in the case of the death of the worker, his dependants) shall receive compensation from his employer in accordance with this Act."

" Section 6 (I.).—In this Act, unless the context or subject-matter otherwise indicates or requires . . . . ' Injury ' means personal injury arising out of and in the course of the employment and includes a disease so arising whether of sudden onset or of such a nature as to be contracted by gradual process other than a disease caused by silica dust."

" Section 5.—Nothing in this Act shall affect the operation of the Workmen's Compensation (Silicosis) Act, 1920, as amended by this Act, ... "

By the Workmen's Compensation (Silicosis) Act, 1920, as amended by the Workers' Compensation Act, 1926–1929, and by the Scheme made by the Minister thereunder, provision is made for the payment of compensation by the employers of workmen in specified industries and processes, or groups of industries and processes, involving exposure to silica dust, who suffer death or total disablement, or partial disablement, from diseases of the pulmonary or respiratory organs caused by exposure to silica dust. " Coal-mining " is not included in the industries or processes, or groups of industries or processes, specified in such Act or the Scheme made thereunder.

The appellant company owns and works coal-mines situated in the State of New South Wales, and the respondent was formerly employed by the appellants as a miner in one of their coal-mines. On March 6, 1933, the respondent filed an application for compensation, which was heard by the Commission, being the appropriate tribunal under the Acts, on May 11 and 12, 1933. On behalf of the respondent there was put in evidence a certificate by a Medical Board (which, by s. 51, sub-s. 3, of the Act, is conclusive evidence as to the matter certified) stating that the respondent had " a partially incapacitating pulmonary fibrosis which could be due to coal dust." The respondent also called two radiologists who had made X-ray examinations of his lungs, and three other medical men. The result of their evidence was that the radiograph showed pneumonoconiosis, there being a mottling on the lungs which meant fibrosis and fine particles of dust, and that the condition observed might be brought about by silica dust or other dusts. The appellants called no evidence and submitted that there was no case to answer. On May 12, 1933, the Commission found :—

" (1.) that the incapacity for work of the applicant " [the respondent herein] " since April 27, 1932, has been, and still is, partial ;

" (2.) that the applicant's partial incapacity for work is due to pulmonary fibrosis, and results from the inhalation of dust in the respondent's " [the appellants herein] " coal mine ;

" (3.) that the disease which partially incapacitates the applicant for work is of such a nature as to be contracted by a gradual process, and his employment with the respondent was employment to the nature of which the disease was due ;

" (4.) that on the evidence before it the Commission is not satisfied that the partial incapacity for work of the respondent results from a disease caused by silica dust."

On these findings they awarded compensation to the respondent, and at the request of the appellant company stated a case for the opinion of the Supreme Court of New South Wales. That Court, by a majority, entered judgment for the appellant company. On appeal, the High Court of Australia, also by a majority, reversed this decision. In both Courts the only question was upon which party the onus lay as regards silica dust.

Carefully reasoned judgments were delivered in both Courts

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below, but their Lordships do not think it necessary to examine these in detail. The majority in the Supreme Court of New South Wales, and the minority in the High Court of Australia, acted on the view that the Workers' Compensation Act applied only to a category of cases restricted in limine by the omission of cases of disease caused by silica dust. That, in the opinion of their Lordships, is to mistake the scope of this legislation. The intention of the Act, as appearing from s. 6, sub-s. 1, is to provide for compensation in every case of injury (including disease) arising out of and in the course of a workman's employment. In the language of Rich J. we have in the Workers' Compensation Act, 1926–1929, a general law for compensating such injuries. That is the paramount enactment, and to give effect to it the words " other than a disease caused by silica dust " must be read as inserted, not to limit it, but to prevent it being appealed to in particular circumstances where the relief would overlap that provided by a special and narrower scheme. Till such overlapping appears, its operation is unaffected. To hold otherwise would have the result that where, as in this case, medical evidence shows that the disease is due to dust, but cannot specify the kind of dust, the workman is left without any compensation at all, though undoubtedly suffering from a disease arising out of and in the course of his employment. This is to leave a gap which destroys the intended completeness of the Scheme.

Their Lordships do not overlook the circumstance that coal-mining is not an industry brought within the operation of the Act dealing with silicosis. The result, no doubt, is that if disease in a coal-miner is affirmatively proved to be due to silica dust the workman is left unprotected ; and, in that case, the two Schemes together do not cover the whole of the ground. The coal-mining industry may have been omitted from the Silicosis Scheme because it was not contemplated that pulmonary disease contracted in a coal-mine could ever be definitely attributed to silica dust in particular. The medical evidence in this case suggests that possibility. It is, however, unnecessary to speculate upon this point. The construction of the Act in its general application cannot be affected by the

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omission of this particular industry from the complementary legislation.

It only remains to add that, basing their conclusion upon the scope and intention of the Act, their Lordships do not find it necessary to examine the decisions referred to in the judgments in the Court below, and in the arguments before this Board, in which the effect of different forms of language upon the onus of proof has been discussed upon general principles.

For these reasons their Lordships will humbly advise His Majesty that the appeal be dismissed. The costs have been provided for by the order granting special leave to appeal.

Solicitors for appellants: *Bell, Brodrick & Gray.*
Solicitors for respondent: *Pattinson & Brewer.*

[PRIVY COUNCIL.]

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In re A REFERENCE UNDER THE GOVERNMENT OF IRELAND ACT, 1920.

In re SECT. 3 OF THE FINANCE ACT (NORTHERN IRELAND), 1934.

Statute (Northern Ireland)—Legislative competence—Contribution by Local Authorities to Exchequer towards cost of education—Levied by means of poor rate—Not a tax substantially the same in character as income tax—Distinction between income tax and rates—Intra vires legislation—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *ss.* 21, *sub-s.* 1; 51—*Finance Act (Northern Ireland)*, 1934 (24 & 25 *Geo.* 5, *c.* 13), *s.* 3.

Sect. 3 of the Finance Act (Northern Ireland), 1934, which provides that there shall be paid to the Exchequer of Northern Ireland by the council of every county and county borough an annual contribution, to be raised by means of the poor rate, towards the cost to the Exchequer of educational services, is within the legislative competence of the Parliament of Northern Ireland.

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* *Present:* VISCOUNT HAILSHAM L.C., LORD THANKERTON, LORD MAUGHAM, SIR GEORGE LOWNDES, and SIR SIDNEY ROWLATT.

Even assuming that under that section a tax is imposed on the ratepayers by the central authority, such tax is not " substantially the same in character " as income tax, which, by s. 21, sub-s. 1, of the Government of Ireland Act, 1920, is expressly excepted as ultra vires the Parliament of Northern Ireland.

It is the essential characteristic of the particular tax that is to be regarded, and the essential difference in character between income tax and rates is that the former is a tax on income generally, whereas the latter are levied in respect of the occupation of hereditaments irrespective of the ratepayer's income generally and irrespective of whether he is in fact deriving profits or gains from such occupation.

REFERENCE under the provisions of s. 51 of the Government of Ireland Act, 1920 (amended by s. 1 of the Irish Free State (Consequential Provisions) Act, 1922, so as to apply to Northern Ireland alone), to have determined the question whether it was within the legislative competence of the Parliament of Northern Ireland to enact s. 3 of the Finance Act (Northern Ireland), 1934, which requires local authorities to levy a rate for the purpose of producing a lump sum payment towards central State expenditure upon education. The contribution payable by the council of every county and county borough under s. 3, sub-s. 1, of the Act towards the cost to the Exchequer of educational services was, by sub-s. 3, to be raised " by means of the poor rate, and shall, so far as it represents a rate on the rateable value of a borough or other urban district, be raised by the council of the borough or urban district upon the demand of the county council." The validity of s. 3 was challenged by the Corporation of Belfast. The Government of Northern Ireland supported the validity of the legislation.

The relevant statutory provisions appear from the judgment of the Judicial Committee.

1936. March 3, 5, and 6. *Gavin Simonds K.C.*, *Sir W. M. Graham-Harrison K.C.*, *J. M. Whitaker K.C.*, and *J. C. MacDermott* for the Corporation of Belfast. Under s. 21, sub-s. 1, of the Government of Ireland Act, 1920, it was beyond the powers of the Parliament of Northern Ireland to impose an income tax or a tax substantially the same in character as an income tax. It is plain from the language of s. 3 of the Finance Act (Northern Ireland), 1934, that the contribution is one towards the cost to the Exchequer of educational services, that is, it is towards the cost of a State service. This contribution to a State service is one which by s. 3, sub-s. 3, the local authority can only raise in one way—" by means of the poor rate." It is imperative: the contribution " shall be raised." This is a tax imposed by the State for a State service, and is a very curious reversion to one of the oldest forms of taxation known in this country: *Brewster* v. *Kidgill* (1), where the method of taxation was by demanding a contribution from every township. The Government of Northern Ireland have reverted to that method of taxation in the present case. The nature of the levy which has been imposed on the citizens of Northern Ireland by virtue of s. 3 of the Finance Act, 1934, is substantially the same as income tax under Sch. B: both taxes are charged in respect of the occupation of hereditaments. Everything that is done by this section of the Finance Act, 1934, could be done quite simply by an amendment of the Income Tax Act. The taxable capacity of the subject in respect of that particular head of income is reduced just as much by this form of taxation as it would be if the rate of income tax under Sch. B was increased. " Rate " is defined in s. 68 of the English Rating and Valuation Act, 1925, and means simply money which is applicable to local purposes by the local authority. This contribution is not a rate: the machinery of rating was used to levy a tax. Further, the tax sought to be imposed by s. 3, in so far as it falls upon the numerous and substantial class of ratepayers who own as well as occupy the houses in respect of which they are rated, is substantially the same in character as income tax charged under Sch. A. Sect. 3 is beyond the powers of the Parliament of Northern Ireland.

On the canons of construction to be adopted see *Attorney-General for Ontario* v. *Reciprocal Insurers* (2) and *Attorney-General for Manitoba* v. *Attorney-General for Canada*. (3)

(1) (1697) 12 Mod. 166, 167.
(2) [1924] A. C. 328.
(3) [1925] A. C. 561, 568.

A. B. Babington K.C. (Attorney-General for Northern Ireland), *Harold Murphy K.C.*, and *J. Desmond Chambers* for the Government of Northern Ireland. The administration of education is in the hands of the local authorities: there is a joint service in respect of financial provisions. The contribution under s. 3 is one towards educational services, and throws a greater burden on the local authority than existed previously; the expenditure is borne partly by the State and partly by the local authority. The contribution payable under s. 3 is in respect of a local service, because by operation of the section itself the burden has pro tanto been transferred from the State to the local authority. There is no analogy whatever between that financial transaction raising the contribution by a rate and a tax on income. It cannot be said that this arrangement places a disproportionate or inequitable burden on the local authority. The Corporation of Belfast say that this charge is in the nature of income tax; that is an attempt to prove that the section has an effect other than that expressed by its words, and the onus of proving that is on the Corporation: *London County Council* v. *Attorney-General.* (1) This particular contribution levied under s. 3 is levied on all persons indiscriminately, whereas under Sch. B the tax is levied only on occupiers. Also, a person may not pay income tax and may yet pay rates. This charge cannot be a tax of the same nature and description as the tax levied under Sch. B: there is no analogy between the two at all. This is not a tax, but a contribution ordered to be levied out of the rates. It has not been shown to be a tax, but if it has, it has not been shown to be a tax "substantially the same in character" as income tax.

Murphy K.C. followed.

Gavin Simonds K.C. replied.

March 27. The judgment of their Lordships was delivered by LORD THANKERTON. In this reference under the provisions of s. 51 of the Government of Ireland Act, 1920, the matter to be determined is whether the provisions of s. 3 of

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(1) [1901] A. C. 26, at p. 35.

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the Finance Act (Northern Ireland), 1934, are beyond the powers of the Parliament of Northern Ireland. Sect. 3 of the Finance Act of 1934 provides as follows :—

" 3.—(1.) There shall be paid to the Exchequer of Northern Ireland by the council of every county and county borough an annual contribution towards the cost to the said Exchequer of educational services.

(2.) The contributions to be paid by each such council as aforesaid in respect of each financial year shall be as follows :—

(*a*) in respect of the year ending on the thirty-first day of March, nineteen hundred and thirty-five, an amount equal to the sum which would be produced by a rate of sixpence in the pound on the rateable value of the county or county borough ;

(*b*) in respect of each subsequent year, an amount equal to the sum which would be produced by a rate of one shilling in the pound on the rateable value of the county or county borough.

(3.) The contribution to be paid by the council of a county or county borough shall be raised by means of the poor rate, and shall, so far as it represents a rate on the rateable value of a borough or other urban district, be raised by the council of the borough or urban district upon the demand of the county council.

Where a council, for the purpose of providing any sums required to be raised by them for the contribution to be paid in respect of the year ending on the thirty-first day of March, nineteen hundred and thirty-five, borrow money temporarily in exercise of the powers conferred upon the council by section three of the Local Authorities (Financial Provisions) Act, 1921 (or any similar enactment in a local Act), the term within which such money is required to be repaid shall be a period not exceeding six months from the ending of the said year.

(4.) The contributions payable under this section shall be paid in such instalments payable at such times as the Ministry of Finance may direct.

(5.) Expenditure incurred by a council in paying any contribution or meeting any demand under this section shall not be taken into account for the purposes of the deficiency contribution under section twelve or section thirteen of the Local Government (Rating and Finance) Act (Northern Ireland), 1929, as amended by any enactment for the time being in force.

(6.) In this section the expression 'rateable value' means the rateable value, subject to the provisions of Part I. of the said Local Government (Rating and Finance) Act, of the hereditaments and tenements rated to the poor rate for the financial year immediately preceding the year in respect of which the contribution is to be paid."

The parties interested, who appeared before the Board, were the Lord Mayor, Aldermen and Citizens of the City of Belfast (hereinafter called "the Corporation"), who challenged the validity of the section above quoted, and the Government of Northern Ireland, who supported the validity of the legislation.

The Corporation bases its challenge on the provisions of s. 21, sub-s. 1, of the Government of Ireland Act, 1920, which provides as follows:—

"21.—(1.) The power of the Parliaments of Southern Ireland and Northern Ireland to make laws shall include power to make laws with respect to the imposing, charging, levying, and collection of taxes within their respective jurisdictions, other than customs duties, excise duties on articles manufactured and produced, and excess profits duty, corporation profits tax, and any other tax on profits, and (except to the extent hereinafter mentioned) income tax (including super-tax), or any tax substantially the same in character as any of those duties or taxes, and the Governments of Southern Ireland and Northern Ireland shall have full control over the charging, levying, and collection of such taxes as their respective Parliaments have power to impose, and the proceeds of all such taxes shall be paid into the Consolidated Fund of Southern Ireland or Northern Ireland, as the case may be.

Provided that it shall not be competent for the Parliament of Southern Ireland or the Parliament of Northern Ireland to impose any tax, whether recurrent or non-recurrent, of the nature of a general tax upon capital, not being a tax substantially the same in character as an existing tax."

The Corporation maintains that under s. 3 of the Act of 1934 a tax is imposed by the Parliament of Northern Ireland which is substantially the same in character as income tax. In the first place, the Corporation contends that, while in form the contributions under s. 3 of the Act of 1934 are paid by the council of a county or county borough to the Exchequer, and it is the council that raises the amount of the contribution by means of the poor rate, the council have no choice in the matter and are merely the hand by which the central authority imposes the levy on the ratepayers, which is therefore a tax imposed by the central authority on the ratepayers. In the view of the opinion formed by their Lordships on the second contention of the Corporation, it is unnecessary to decide this question, but their Lordships will assume that the first contention of the Corporation is correct.

It therefore remains to consider the second contention of the Corporation—namely, that the tax so imposed by the central authority on the ratepayer is " substantially the same in character " as income tax. Counsel for the Corporation sought to establish this substantial similarity in character by a detailed comparison of the provisions of the Income Tax Act, 1918, under Sch. A and, in particular, Sch. B, with the provisions of the Poor Relief (Ireland) Act, 1838, along with the fact that under s. 187, sub-s. 1, of the Income Tax Act, 1918, the value of all tenements and rateable hereditaments for the purposes of Schs. A and B is ascertained primarily according to the valuation for poor rate purposes. But, in the opinion of their Lordships, it is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery—often complicated—by which the tax is to be assessed is not of assistance, except in so far as it may throw light on the general character of the tax. Such an examination as counsel for the Corporation invited their Lordships to enter upon would tend to narrow the legislative powers of taxation of the Parliament of Northern Ireland almost to the vanishing point, whereas by s. 21, sub-s. 1, of

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the Act of 1920 legislative powers are conferred in general terms, subject only to the specified exceptions.

In a familiar passage in *London County Council* v. *Attorney-General* (1) Lord Macnaghten has described the character of income tax as follows (2) : " Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Sch. D and those assessed under Sch. A or any of the other schedules of charge. One man has fixed property, another lives by his wits ; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all." The purpose of the Income Tax Acts is to tax a person's total income from all sources ; the method of assessing income derived by ownership or occupation of hereditaments is somewhat arbitrarily based on annual value and not on actual income, but that does not alter the essential characteristics of income tax, that it is a tax on income generally.

On the other hand, the poor rate is levied in respect of the occupation of hereditaments, irrespective of a person's income generally, and irrespective of whether the ratepayer is in fact deriving profits or gains from such occupation. A dwelling-house is a burden, not a source of profit, for the occupier who pays rent for it. He is rated on the value of the burden, while he remains unrated in respect of his whole profits, be they from business or from investments. In their Lordships' opinion, this marks the essential difference in character between income tax and rates, and it is unnecessary to consider other and less important differences between them.

Their Lordships are therefore of opinion, even assuming that under s. 3 of the Finance Act of 1934 a tax is imposed on the ratepayers by the central authority, that such tax is not substantially the same in character as income tax, and that the provisions of s. 3 are within the powers of the Parliament

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(1) [1901] A. C. 26.

(2) Ibid. 35.

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of Northern Ireland. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the Corporation of Belfast: *Dyson, Bell & Co.*

Solicitors for the Government of Northern Ireland: *Linklaters & Paines.*

[HOUSE OF LORDS.]

H. L. (E.)
1935
July 8.

LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MANCHESTER . . . . APPELLANTS;

AND

MARKLAND . . . . RESPONDENT.

Negligence—Water Authority—Bursting of service pipe—Delay in repairing—Frozen water—Skidding motor-car—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93).

The Manchester Corporation were the statutory authority for the supply of water to the Borough of Eccles. In February, 1933, one of the Corporation's service pipes in a road in Eccles burst and caused a pool of water to form in the road. The water lay unheeded for three days. On the third day a frost occurred, the water froze, and on the ice so formed a motor-car skidded and knocked down and killed a man. The Corporation were not informed until after this accident that the service pipe had burst.

In an action under the Fatal Accidents Act, 1846, by the widow of the deceased man against the Corporation and the owner of the car, the judge at the trial exonerated the owner of the car from blame, but held the Corporation liable in damages for negligence in not having taken prompt steps to attend to the leak and so to prevent the road from being dangerous to traffic.

Held, affirming the decision of the Court of Appeal, [1934] 1 K. B. 566, that the Corporation were liable.

* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD WRIGHT, and LORD ALNESS.

APPEAL from an order of the Court of Appeal. (1)

The facts are stated in detail in the judgment of Lord Tomlin, and summarized in the headnote. The Court of Appeal, Slesser L.J. and Talbot J. (Scrutton L.J. dissenting), affirmed the judgment of Macnaghten J. at the trial.

The Manchester Corporation appealed.

1935. June 4. *Stuart Bevan K.C.*, *Eastham K.C.* and *Harold Rhodes* for the appellants.

Gorman K.C. and *Rycroft* for the respondent were not called upon to argue.

June 6. The House took time for consideration.

July 8. LORD ATKIN. My Lords, I have had an opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Tomlin. I entirely agree with it and have nothing to add.

LORD TOMLIN. My Lords, I am authorized to say that my noble and learned friends Lord Thankerton, Lord Wright, and Lord Alness, concur in the opinion which I am about to deliver.

In this case the respondent sued the appellants and one William Bamford under the Fatal Accidents Act, 1846, for damages for loss sustained by her by reason of the death of her husband. He had been killed in an accident occurring in circumstances which I will shortly narrate.

The accident happened on the main road running between Salford towards the north-west and Bolton towards the south-east. About fifty or sixty feet southward of the point on this road where the accident happened the boundary line between the urban district of Worsley towards the north and the borough of Eccles towards the south crosses the road at right angles. The highway authority immediately north of this boundary is the Urban District Council of Worsley and immediately south of this boundary is the Corporation of the Borough of Eccles. Along the length of this road runs an electric tram line owned and operated by the Corporation of Salford. The Lancashire County Police have jurisdiction in the neighbourhood of the accident. The districts through which the road runs are outside the city of Manchester, but within the area of supply of the appellants as water undertakers under the Manchester Corporation Waterworks Act, 1897, and the Acts incorporated therewith and amending the same, and as such undertakers the appellants own (inter alia) a five-inch main running the length of the road on its easternmost side and the service pipes connecting the main with the adjoining houses on each side of the road. At about 11.15 P.M. on Saturday, February 11, 1933, the deceased descended from the rear of a tram-car, which was travelling towards Salford and had stopped at a point with its rear end about fifty or sixty feet north of the boundary already mentioned. While still holding the rail of the car he was struck by a motor-car driven by Bamford and also travelling towards Salford. The deceased died from his injuries shortly after the accident.

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(1) [1934] 1 K. B. 566.

The action was tried at Manchester by Macnaghten J. sitting without a jury. The facts as found by the learned judge were as follows:—

(1.) On Thursday, February 9, 1933, a burst occurred in the lead service pipe of the appellants leading from the five-inch main to two houses on the west side of the road to the south of the point where the accident happened;

(2.) As the result of the burst, water was forced up on the surface of the road and formed a pool extending northwards towards the site of the accident;

(3.) This state of things continued all Thursday, Friday and Saturday, February 9, 10, and 11;

(4.) About 8 o'clock on Saturday evening, February 11, there was a sudden and severe frost which froze the pool; and

(5.) The skidding of Bamford's car on the ice thus formed was the immediate cause of the accident.

The learned judge held that there was no want of care on the part of Bamford, and that the action failed as against him. There was no appeal against this conclusion.

With regard to the appellants, the particulars alleged that they (1.) caused or permitted a certain water-main, the property of the appellants, to flood the roadway with water in such a manner as to render the road dangerous for traffic proceeding thereon;

(2.) knew or ought to have known that the water-main was leaking and causing water to run over the surface of the roadway, and knew or ought to have known that in view of the coldness of the weather the water was likely to freeze and cause a sheet of ice to form in the roadway to the danger of traffic proceeding thereon, and failed to take any or any reasonably sufficient steps to prevent this happening or to warn traffic using the roadway of the said danger or otherwise to provide for the safety of persons lawfully using the roadway.

The learned judge held that there was no ground for alleging any negligence or want of care against the appellants either in the laying of the pipe which burst or in the maintenance of that pipe, and that therefore the case made against them under the first head of the particulars failed.

Upon the second head of the particulars the learned judge held that it was incumbent upon the appellants to take all reasonable steps to inform themselves of bursts in the pipes of their system, and to effect prompt repairs, and that they had failed to discharge that duty in the present case, and were liable to the respondent for the result of their negligence.

By consent an order was made for payment by the appellants to the respondent in lieu of a lump sum for damages the sum of *2l.* 10*s.* per week during her widowhood.

On appeal by the appellants the Court of Appeal by a majority (Scrutton L.J. dissenting) affirmed the learned judge. Scrutton L.J. took the view that what occurred was due to a failure of the appellants' precautions or sources of information and was not a failure due to negligence.

It is not disputed that the appellants have a duty to take all reasonable precautions to secure that leaks in their system should be brought to their knowledge and be repaired with promptitude. The question is whether they failed in that duty in the present case.

The appellants' area of supply extends considerably beyond the boundaries of the City of Manchester and into districts in which the highways, the police, and transport undertakings such as tramways are under the control of other bodies. The area of supply is 130 square miles in extent. It contains 1250 miles of mains and 200 miles of lead service pipes. There are said to be an average of about 50 bursts a week.

What is it that the appellants did to secure that in districts outside the city bursts in their pipes should be promptly made known to them? They had certain periodical examinations and tests made at the various stop-cocks and hydrants involving a visit to any given spot about once in nine days, but beyond this they did nothing. I adopt the words of Talbot J. (1): "But as to anything more, they rely entirely on the chance that some policeman or road officer, or other servant of another authority, or some householder or other person may give them information." This was a system or want of system which the appellants' own officer, Mr. Dalton, did not apparently regard as satisfactory.

It is said on the appellants' behalf that the interest of the several authorities outside the city to see that no damage is done to the roadways within their districts, and that no loss or inconvenience is occasioned to the inhabitants, is so strong as to make it reasonable on the part of the appellants to trust to the officials of those authorities to communicate to them news of leakages. I do not think so. I agree with Slesser L.J. that the learned judge was fully entitled to come to the conclusion that these precarious, unreliable and unco-ordinated methods of receiving information did not exonerate the appellants. If the appellants choose to rely upon the chance of being kept informed by the outside means which I have indicated, without taking any precautions on their own part, and that chance fails them, they cannot be heard to say that they have discharged their duty.

It was contended, however, that the respondent was bound to show what steps the appellants ought to have taken. I do not agree. It is obvious that there are many things which

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(1) [1934] 1 K. B. 585.

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might reasonably have been done to secure to the appellants early notice of any burst. It is in my opinion enough for the respondent to have shown, as she has shown here, that, apart from the routine examinations which I have mentioned, the matter was left to chance, and that in the particular case no notice of the burst was given to the appellants until at least three days after the burst had happened.

I think upon the material before him the learned judge was fully entitled to reach the conclusion he did. In my opinion his conclusion was the right one, and this appeal ought to be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 8, 1935.

Solicitor for appellants: *Sharpe, Pritchard & Co., for F. E. Warbreck Howell, Town Clerk, Manchester.*

Solicitors for respondent: *Sydney G. Carnt, for Flint & Holmes, Salford.*

[HOUSE OF LORDS.]

H. L. (E.)*
1936
Feb. 10.

LONDON AND NORTH EASTERN RAILWAY COMPANY . . . . } APPELLANTS;

AND

COUNTY COUNCIL OF THE NORTH RIDING OF YORKSHIRE . . . } RESPONDENTS.

Railway Company—Highway—Bridge—Highway carried over Railway—Liability to repair highway—Great North of England Railway Act, 1837 (1 *Vict. c.* cii), *ss.* 31, 35, 36—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 46.

By s. 31 of a Local Act, the Great North of England Railway Act, 1837, it was provided, in terms equivalent in all material

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* *Present:* LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD MAUGHAM.

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respects to those of the first clause of s. 46 of the Railways Clauses Consolidation Act, 1845, that "In all cases in which the railway by this Act authorized to be made shall cross any . . . . public highway, either such . . . . public highway (except such as are hereinafter mentioned) shall be carried over the said railway, or the said railway shall be carried over the said . . . . public highway at the expense of the said company, by means of a bridge, where not otherwise provided by this Act, of such construction as is in this Act mentioned."

The appellants, as successors to the Great North of England Railway Company, were subject to the provisions of s. 31 of the Local Act above mentioned. Under and by virtue of that enactment an ancient carriage way, now vested as a county road in the respondents, was carried over the appellants' railway by means of a bridge:—

Held, that the appellants and not the respondents were liable for the maintenance and repair of that portion of the road which was carried by the bridge.

Attorney-General v. *Midland Ry. Co.* (1908) 99 L. T. 961; (1909) 100 L. T. 866 discussed; *Lancashire & Yorkshire Ry. Co.* v. *Mayor, etc., of Bury* (1899) 14 App. Cas. 417, followed and applied.

Order of the Court of Appeal affirmed.

Appeal from an order of the Court of Appeal affirming an order of the Chancery Division. The question was whether the London and North Eastern Railway Company, hereinafter called "the Company," are liable to maintain and keep in repair that part of a certain country road which runs over a bridge made by the Company's predecessors in title in constructing a railway now vested in the Company under statutory powers, and over the approaches to the bridge.

The road in question is an ancient public carriage way leading from Northallerton to Yafforth which existed as a public highway long before 1837. It is situate in the North Riding of Yorkshire. It never was a turnpike road. Under and by virtue of the Local Government Act, 1929, it has become and is a county road, and the County Council of the North Riding of Yorkshire, hereinafter called "the County Council," are liable for its maintenance and repair except in so far as that liability has been imposed upon the Company.

The Company are the successors of the Great North of England Railway Company which was incorporated by the Great North of England Railway Act, 1837 (1 Vict. c. cii.). As such successors the appellants are subject to all the liabilities imposed upon the original Company by the Act of 1837 or otherwise in relation to bridges, approaches and roads.

Part of the appellants' main line between York and Darlington, constructed under the Act of 1837, crosses the aforesaid road from Northallerton to Yafforth; and the road was carried over the railway near Northallerton by a bridge, known as Zetland Bridge, and the approaches thereto. This was done under and by virtue of ss. 31, 35 and 36 of the Act of 1837, which are set out at length in the judgment of Lord Blanesburgh. Sect. 31 of that Act is in all material respects equivalent to s. 46 of the Railways Clauses Consolidation Act, 1845. (1)

In September, 1932, the road over Zetland Bridge and its approaches were in a bad state of repair. On December 14, 1932, the County Council issued a writ in the Chancery Division and claimed a declaration that the Company were liable to maintain in a proper state of repair, among other parts of public highways mentioned in the statement of claim, that part of the public highway from Northallerton to Yafforth which passes over Zetland Bridge, and the approaches to that part; and an order directing the Company to do all works necessary to put each of the roads mentioned into a proper state of repair and from time to time to make such repairs as might be necessary.

The Company contended that they were not liable to repair the road over Zetland Bridge or any other road over any bridge spanning the railway authorized by the Act of 1837.

The case was heard before Luxmoore J.; who made a declaration that the Company were liable under the Great North of England Railway Act, 1837, to maintain the roads over some of the bridges, including the Zetland Bridge, mentioned in the statement of claim and over the approaches to those bridges.

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(1) The first clause of s. 46 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), is as follows: "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act), either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided"; the second clause runs thus "and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: Provided," etc.

The Company appealed. The Court of Appeal affirmed the order of Luxmoore J., and dismissed the appeal.

The Company appealed to this House.

1935. Oct. 31. *Gavin Simonds K.C.*, *Raymond Evershed K.C.* and *A. Andrewes Uthwatt* for the appellants. Both the Courts below held that they were bound by the decision of the Court of Appeal in *Attorney-General* v. *Midland Ry. Co.* (1) affirming the judgment of Parker J. (2). That case was decided upon the construction of words in s. 72 of the North Midland Railway Company's Act, 1837, corresponding to s. 35 of the private Act in this case, and providing that where a bridge is erected for the purpose of carrying a public carriage way over the railway the road over the bridge shall be formed and continued of a width of not less than twenty feet. From that provision it was inferred that the railway company in that case was bound to maintain and repair the road. But that inference was based on the fallacy of taking the width of the road for the road itself. The railway company were forbidden to lessen the width of the road, but that prohibition does not involve a liability to repair it. The decision in *Attorney-General* v. *Midland Ry. Co.* (3) based on this confusion between the width and the substance of a road cannot be supported, and can afford no support to the decision of the Court of Appeal in the present case.

Nov. 1. *Alexander Grant K.C.* and *Wilfrid M. Hunt* for the respondents. This case is really concluded by the decision of this House in *Lancashire and Yorkshire Ry. Co.* v. *Mayor, etc., of Bury.* (4) That case was decided upon the proper construction of s. 46 of the Railways Clauses Consolidation Act, 1845, which is the counterpart of s. 31 of the Great North

(1) 100 L. T. 866.
(2) 99 L. T. 961.
(3) 99 L. T. 961; 100 L. T. 866.
(4) 14 App. Cas. 417.

of England Railway Act, 1837. There it was held that, where a bridge carries a public highway over a railway, the bridge and the highway are one; and those who are liable to repair the bridge are liable to repair the highway also. It is not disputed that the appellants are liable to repair the bridge. It follows that they are liable to repair the road over the bridge.

Nov. 4. *Gavin Simonds K.C.* replied.

The House took time for consideration.

1936. Feb. 10. LORD BLANESBURGH. My Lords, in the Session of 1837, in the early days of railway construction, a private Act, 1 Vict. c. cii.—I will call it the Act of 1837—was passed authorizing The Great North of England Railway Company, thereby incorporated, to construct a railway line passing on its way through the North Riding of Yorkshire, and intersecting in its course divers turnpike and other public roads. The railway authorized by the Act and the powers, privileges and obligations of the original Company in relation thereto have passed to the appellants the London and North Eastern Railway Company. The railway is now a section of that Company's main line, and the question raised by this appeal is whether they, as has been so far adjudged, are liable to maintain and keep in repair such parts of certain of these intersected roads as pass over or are included in the structure of certain bridges erected by the original Company under the Act of 1837 for carrying over their railway the roads so intersected.

In the session of 1836 an earlier railway Act had been passed (6 & 7 Will. 4, c. cvii) containing provisions with reference to the construction and maintenance of bridges over intersected county and turnpike roads in the County of Derby, closely analogous to the provisions in that behalf of the Act of 1837, and in 1908 an action was brought by the Attorney-General on the relation of the Derbyshire County Council against the Midland Railway Company (1), to which Company the railway authorized by the Act of 1836 had passed, with the object of having it determined whether that Company was under the Act of 1836 liable for the maintenance and repair of what in that instance was a turnpike road carried by a bridge over the railway. There the liability of the Railway Company was established before Parker J. (1) and on appeal by the Court of Appeal. (2) And until 1932 that decision was treated by the appellants and their predecessors as regulating their liabilities under the Act of 1837: and when in that year they disclaimed further liability and this action was brought by the respondents to establish it, the question was in both Courts below disposed of upon the footing, accepted by the appellants, that it was there concluded by the earlier authority. An arranged form of declaration was, on that basis and without argument, made by Luxmoore J., and an appeal was by the Court of Appeal, again without argument, dismissed. This procedure was adopted in order that the decision in the *Derbyshire* case (2) might be reviewed in this House. The present appeal has been regarded as one from the judgment in that case.

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(1) 99 L. T. 961.

The parties raise no issue as to the standard of repair required. No matter of fact is in dispute, and except as qualified by the declaration, in this respect agreed to, each of the roads over the bridges in question, with their respective approaches, stand, so far as the appeal is concerned, in the same position. For convenience only the parties have concurred upon a statement of the facts as regards the road running over a bridge known as Zetland Bridge.

That road, part of the highway from Northallerton to Yafforth, is an ancient public carriage road which has existed since long prior to the year 1837. The road never was a turnpike road. Under or by virtue of the Local Government Act, 1929, it has become and is a county road and the respondents under that Act became and they are now the body liable for its maintenance and repair except as to any part of it for the maintenance and repair of which the appellants may be responsible.

The road is carried over the appellants' railway line near Northallerton by the Zetland Bridge and its approaches. The question of liability now raised may be conveniently

(1) 99 L. T. 961.

(2) 100 L. T. 866.

considered with the Zetland Bridge and the road over it in view.

The sections of the Act of 1837 upon which the question at issue depends, are a fasciculus of clauses numbered 31 to 38. No question of common law liability in the event arises. By these sections roads are divided into two classes—(A) turnpike roads, with which we are not now directly concerned : and (B) other public highways not being turnpike roads, with which we are here directly concerned. Sects. 31, 36 and 37 apply to both classes of roads : ss. 32 and 33 apply to turnpike roads exclusively and ss. 34 and 35 apply only to roads other than turnpike roads. Sects. 31 and 35 are the sections immediately relevant, and it will not, I think, be necessary, even for convenience of reference, to do more than set forth these two sections, together also with s. 33 in order thereby to point the distinction made by the Act in this matter of repair and maintenance between turnpike roads and other public roads. These selected sections are as follows :—

Sect. 31 : " And be it further enacted, That in all Cases in which the Railway by this Act authorized to be made shall cross any Turnpike Road or public Highway, either such Turnpike Road or public Highway (except such as are hereinafter mentioned) shall be carried over the said Railway, or the said Railway shall be carried over the said Turnpike Road or public Highway, at the Expence of the said Company, by means of a Bridge, where not otherwise provided for by this Act, of such Construction as is in this Act mentioned."

Sect. 33 : " And be it further enacted, That in all Cases where a Turnpike Road shall be carried over the said Railway, such Turnpike Road shall be efficiently defended and supported by and with proper Walls and other sufficient Fences for the Protection of Passengers using the same ; and as well where a Turnpike Road shall be carried over the said Railway as where the said Railway shall be carried over a Turnpike Road, the several Works so to be made, constructed, executed, and completed as aforesaid, with the Inclinations of such Turnpike Road, and the Approaches to or towards the said Railway, shall be so made, constructed, executed, and completed in manner aforesaid, by and at the Expence of the said Company, in a proper and workmanlike Manner, to the Satisfaction of an uninterested competent Road Surveyor to be appointed by the Trustees of such Turnpike Road and the said Company, or, in case they shall disagree about the same, by the Clerk of the Peace for the County or Riding into or through which the Part of the Turnpike Road so to be altered or made shall lie or pass ; and the said Company shall at all Times and on all Occasions thereafter well and sufficiently maintain, uphold, amend, and keep in repair the Bridges, Tunnels, Arches, Drains, Sinks, Sewers, Under-drains, Parapet Walls, Fences, and the Walls, Banks, Mounds, Batteries, Erections, and other Works for the Support of such Bridges, Tunnels, Arches, Turnpike Road, and Approaches thereto respectively, and for the Protection of all Persons, Horses, and Cattle using such Turnpike Road ; and after any such Turnpike Road shall have been so made, constructed, executed, and completed by and at the Expence of the said Company in manner as aforesaid, the same shall for ever thereafter be vested in and become the Right and Property of the Trustees of such Turnpike Road ; but all Mines, Minerals, and Fossils laying under the same shall be the Property of the Person or Persons who would from Time to Time have been entitled to the same if this Act had not been passed, and the subsequent Surface Repairs of such Turnpike Road shall from thenceforth be made and performed by the Trustees of such Turnpike Road from Time to Time out of the Funds applicable to the Repair of such Turnpike Road."

Sect. 35 : " And be it further enacted, That in all Cases in which any Bridge shall be erected for the Purpose of carrying any public Carriage Road over the Railway by this Act authorized to be made, the Road over such Bridge shall be formed and shall at all Times be continued of such Width as to leave a clear and open Space between the Fences of such Road of not less than Twenty Feet ; and the Ascent of every such Bridge for the Purpose of such public Carriage Road shall not exceed One Foot in Twenty Feet, and in the Case of any private Carriage Road shall not exceed One Foot in

Sixteen Feet; and a good and sufficient Fence shall be made on each Side of every such Bridge, which Fence shall not be less than Four Feet above the surface of such Bridge."

My Lords, it must, I think, be agreed that there is not by these clauses imposed upon the Railway Company in express words any obligation to repair or maintain anything which by the statute the Company is required to construct, but, as Parker J. expressed it in the *Derbyshire* case (1), the Courts very easily imply such an obligation where a body by statute authorized in that behalf has for its own purposes interfered with a public road.

And the case here is, I think, on s. 31 alone concluded against the appellants by two circumstances: The first is a decision of this House in *Lancashire and Yorkshire Ry. Co.* v. *Mayor, etc., of Bury* (2) affirming the judgment of the Court of Appeal (3) to the effect that under the first words of s. 46 of the Railways Clauses Consolidation Act, 1845—words in substance equivalent to those of s. 31 of the Act of 1837—the word "bridge" included the highway over it. And the second is an admission of liability by the appellants to which reference will presently be made.

The decision in the *Bury* case is, I think, most clearly given in the words of Fry L.J. in the Court of Appeal (4): "It was argued," he says, "that 'bridge' does not include the road over the bridge; and that the section imposes no liability on the railway company to maintain the roadway. . . . . It seems to me that in cases to which the section applies, they are bound to make a bridge, and to make a roadway over the bridge as part of the bridge. It appears to me that by the ancient law of England, where a bridge formed part of the highway, the bridge included the roadway over the arches of the bridge. The Statute of Bridges, 22 Hen. 8, c. 5, is silent as to the roadway over the bridge, but it is not disputed that the liability under that statute extended to such roadway."

And, my Lords, the admission of the appellants above referred to, which must be read in connection with Fry L.J.'s

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(1) 99 L. T. 961, 963.
(2) 14 App. Cas. 417.
(3) (1888) 20 Q. B. D. 485.
(4) Ibid. 489.

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statement of the effect of a section the counterpart of s. 31 is that the original company were bound to construct Zetland Bridge with the defined road properly metalled and completed laid across it, and were bound further to maintain the bridge and keep it in repair.

I am content for the result, to refer again to Fry L.J. where he says, (1) " Whatever under the section the company are bound to execute, they are also bound to maintain." If " bridge " includes the road over it, the appellants' admission, I think necessarily made, carries the whole case against them. It is not open to them to discriminate between the bridge and the road.

But, my Lords, the *Bury* case (2) by itself and apart from that admission, would not, as I read the decision, be enough for the respondents here. While the question might remain in doubt on Lord Herschell's judgment in this House, it is made clear by the Court of Appeal that the obligation to maintain as distinct from the obligation to construct both bridge and road was in that case asserted and found in the second part of s. 46 which has no counterpart in our s. 31, and which, it will be recalled, runs thus : " and such bridge with its immediate approaches . . . . shall be executed and at all times thereafter maintained." It is in this passage that Fry L.J. finds the obligation to repair the roadway. " I have no hesitation," he says (3), " in coming to the conclusion that the words ' such bridge ' in s. 46 mean the bridge with the road on it which is constructed for the purposes of the highway." In other words the bridge there to be repaired was the bridge which by the express terms of the section was to be maintained, and we have no such provision in s. 31 here. The equivalent of such a provision is however, I think, in this case supplied by the admission.

But, further, my Lords, the express terms of s. 46 of the Clauses Act find their counterpart, I think, in s. 35 of the Act of 1837. I am unable myself to take the view that s. 35 is merely a construction section. I read it as imposing a direct obligation to construct the road and rails, etc., all as therein prescribed

(1) 20 Q. B. D. 489.

(2) 14 App. Cas. 417.

(3) 20 Q. B. D. 490.

and to continue these works so constructed.

And it has to be noted that in the *Derbyshire* case (1) the analogue of s. 35—s. 73—was the only section of the 1836 Act on which the Court could rely. That case related, as I have said, to a turnpike road and s. 70, the analogue of s. 31 of the Act of 1837, did not apply to turnpike roads at all, while s. 73 unlike s. 35 here did so apply. Both Courts reached their conclusion on s. 73, that is our s. 35, alone. And in my judgment they had warrant for so doing But the case against the present appellants when s. 31 can also be invoked against them is much stronger, because in my judgment s. 35 is not weakened by s. 31 so extended ; and to the whole case thus made against them I can see no effective answer.

My Lords, the *Derbyshire* Act of 1836 contained no section like s. 33 of the present Act, and as a reason against the construction advocated by the Railway Company reliance was in that case placed upon the inconvenience of leaving the repair of the bridge in one authority and the repair of the roadway in another. In the present statute, s. 33 is an enactment to that very effect. But that section throws the liability on the turnpike trustees. Had it been thrown on the Railway Company the section would have been more eloquent for the appellants, inasmuch as the inference might then have been immediate that its liability—however easily presumed—was not to be extended beyond the expressed limit. As the section stands, however, it is merely an intimation that in that case only is the presumptive liability of the Railway Company removed.

All these differences between the Act of 1836 and the Act of 1837, and the fact that the decision in the *Derbyshire* case (1) had reference only to a turnpike road makes it difficult to regard that decision as completely covering the present—the supposition in the Courts below. But as, in my judgment, the present is an a fortiori case, that difficulty is not serious.

In my judgment this appeal should be dismissed and I move your Lordships accordingly.

(1) 99 L. T. 961 ; 100 L. T 866.

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Lord Russell of Killowen. My Lords, I agree that this appeal must fail; but my opinion is not based either on s. 35 of the Great North of England Railway Act, 1837, or on the judgments of Parker J. and the Court of Appeal in the *Midland Railway* case. (1) Those judgments establish the Railway Company's liability to repair, by construing the section which, in the Act there in question, corresponds to the above-mentioned s. 35, as imposing on the Railway Company an obligation to continue or maintain the road, i.e., to keep it in repair. As at present advised I feel grave difficulty in assenting to this view. Sect. 35 appears to me to be only a dimensional provision. Any obligation thereby imposed on the Company appears to me to be an obligation to continue the width of the road—(i.e., to do nothing to reduce that width)—and not an obligation to maintain the surface of the road.

However, it is not necessary to pronounce a final decision as to this, because I feel myself constrained by authority of this House to hold that an obligation to repair the road is imposed on the Railway Company under or by virtue of s. 31 of the Act. That section and s. 46 of the Railway Clauses Consolidation Act, 1845, are both as to purpose and language substantially identical; and notwithstanding the distinction apparently drawn in s. 46 between the bridge and the road, it was held in the *Bury* case (2), that the word "bridge" in the section included the road, upon the ground that the road over the railway was part of the bridge. It is true that in the latter portion of s. 46 of the Act of 1845 are to be found, as being things which the Railway Company must maintain, the following words, "such bridge, with the immediate approaches, and all other necessary works connected therewith." The decision in the *Bury* case in your Lordships' House (2) was not, however, founded on the presence of those words, but solely on the meaning of the word "Bridge," and on the view that the road across the railway was in fact part of the bridge.

It is true that in the Act now in question, s. 33 in terms treats a turnpike road crossing the railway as something distinct from the bridge and not forming part of it. The result of this section is no doubt that any obligation to repair a turnpike road over the railway which would otherwise be cast upon the Railway Company by s. 31, is thereby placed upon the turnpike trustees: but this specific provision as to turnpike roads would not justify me in holding that the ratio decidendi of the *Bury* case (1) did not still apply to s. 31.

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(1) 99 L. T. 961; 100 L. T. 866. (2) 14 App. Cas. 417.

It was conceded, and rightly conceded, that s. 31 imposed an obligation on the Railway Company to keep in repair the bridge there referred to. It follows, if the road across the railway is included in and forms part of the bridge, that the obligation to keep in repair extends to the road crossing the railway.

LORD MACMILLAN. My Lords, There are various places in the North Riding of Yorkshire where the public highway is carried over the appellants' railway by a bridge. The question, broadly stated, is whether the appellants are bound to maintain at their own expense the roadway on these bridges.

The portion of the appellants' railway system with which the case is concerned was constructed by the appellants' predecessors the Great North of England Railway Company pursuant to the powers conferred on that company by a local and personal Act of 1837. The obligations imposed by that statute on the Great North of England Railway Company are now incumbent on the appellants and it is therefore necessary to examine the terms of the statute in order to see whether the liability in question is among the obligations so imposed.

The topic of road and railway crossings is dealt with in s. 31 of the Act. Selecting from that section the relevant words I find it enacted that, in all cases in which the railway shall cross any public highway, either the public highway shall be carried over the railway or the railway shall be carried over the public highway, at the expense of the company, by means of a bridge of such construction as is mentioned in the Act.

The appellants concede that under this enactment their predecessors were under an obligation initially to construct at their own expense not only the bridge but also the roadway

(1) 14 App. Cas. 417.

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upon it at all points where the public highway had to be carried over the railway. They further concede that the enactment imposes upon them a continuing obligation to maintain at their own expense the structure of the bridge in all time coming. But in the matter of maintenance they seek to differentiate between the bridge and the roadway which it carries, and they dispute their liability to maintain the latter.

The liability to maintain the structure of the bridge which the appellants concede has been imposed upon them is not made matter of specific obligation in s. 31. It is, however, in my opinion, plainly implied. The section, as I read it, imposes a continuing obligation on the railway company at their own expense to carry the highway over the railway by a bridge and to fulfil that obligation the bridge must be maintained at their expense. But, in my opinion, the obligation equally extends to the maintenance of the roadway which the railway company were admittedly bound to construct on the bridge. It being conceded that in the matter of original construction the language of the section imposes upon the railway company the obligation without distinction to construct both bridge and roadway at their own expense, I can see no ground in the language of the section for discrimination between bridge and roadway in the matter of future maintenance.

The appellants' main argument was founded on the fact that the section by its own terms differentiates between the highway and the bridge which carries it. But when the section speaks of the public highway I do not think that these words refer to the highway as a structure contrasted with the bridge as a structure. They refer rather to the means of passage provided by the highway. The public in future are to be provided with a bridge as the means of exercising their public right of passage. If the bridge is to be a means of passage it must as a structure comprise the roadway upon it.

In the case of bridges over turnpike roads it is true that s. 33 discriminates between the turnpike road and the bridge which supports it, but the obligation of performing "the subsequent surface repairs" is there imposed upon the turnpike trustees in express terms. Thus in this statute when the Legislature means to impose this obligation upon any one other than the railway company it says so.

Sect. 31 of the Act of 1837 is a precursor in less developed form of s. 46 of the Railways Clauses Act, 1845. In the case of the latter section the language affords a stronger argument for discriminating between bridge and roadway in the matter of future maintenance, for s. 46 contains an express obligation to maintain the bridge and says nothing about maintaining the highway. But this House, in *Lancashire and Yorkshire Ry. Co.* v. *Mayor, etc., of Bury* (1) held that the obligation to maintain the bridge included the obligation to maintain the roadway which it carried. That decision, which is binding upon your Lordships, is a direct authority in favour of the interpretation which I place upon s. 31 of the Act of 1837.

In the Courts below the present case was assumed to be concluded by the decision in the case of the *Attorney-General* v. *Midland Ry. Co.* (2), where a statute in substantially the same terms as the Act of 1837 was under consideration. There the decision that the railway company was bound to maintain the roadway on the bridge was founded on a section, corresponding to s. 35 of the Act of 1837, which required roads over bridges to be formed and at all times continued of a certain specified width. For my part I do not base my opinion in the present case on the language of s. 35 of the Act of 1837, which seems to me to be a section fulfilling the promise held out in s. 31 that the nature of the construction of the bridge will be found mentioned later in the Act, and thus to be a section merely prescribing the dimensions of the bridge which the railway company has already in s. 31 been required to construct. So far as it goes, however, s. 35 fortifies the view that the railway company are under a continuing obligation to maintain the roadway which they are required to form.

In the result accordingly I am of opinion that the judgment of the Court of Appeal, affirming the judgment of Luxmoore J.

(1) 14 App. Cas. 417.

(2) 99 L. T. 961 ; 100 L. T. 866.

(which contains the appropriate qualifications) should in turn be affirmed by this House.

Lord Maugham (read by Lord Macmillan). My Lords, In the last year of the reign of King William the Fourth, one of the first railways made in this country was authorized by Parliament. The Company was to be called " The Great North of England Railway Company " (6 & 7 W. 4, c. 105). In the following year another Act was passed authorizing an extension of the line to the city of York and two additional branch railways, and some of the powers and provisions considered in the first Act were altered, amended or explained.

There were at that time in England over a thousand turnpike roads vested in and repairable by trustees and (as now) a great number of public highways were vested in different persons and repairable by divers public authorities. It was thought desirable to prohibit the passage of the railways over these roads by level crossings, and accordingly the Act contained eight sections, numbered 31 to 38, to meet the difficulty; and it will be observed that the turnpike roads and the public highways were the subject of different regulations. Railway Acts at that time were in their infancy, and it is not surprising to find that the sections which give rise to the present questions are in some respects imperfect.

The railway line necessarily had to pass over or under various turnpike roads and public highways, including in particular an ancient public carriage road and highway in the North Riding of Yorkshire, which is now a county road by virtue of the Local Government Act, 1929, repairable by the respondents except as to any portion thereof for the repair of which the appellants may be liable. The road, pursuant to s. 31 of the Act, was carried over the railway line by a bridge known as Zetland Bridge. Certain approaches with a gradient not exceeding one in twenty were constructed under s. 35. The bridge and the approaches and the road were made by and at the expense of the Railway Company, and the road along the approaches and over the bridge as well as the approaches and the bridge till recently have been repaired from time to time by the Company and their successors, the last of whom are the appellants.

There are other ancient public carriage roads and highways (not being turnpike roads) which were carried over the same railway by bridges and approaches formed for that purpose by the Railway Company. These roads also have become county roads, and so far as repair is concerned they are in the same position as the road over Zetland Bridge and its approaches. It is convenient to take the latter as typical. The question raised on this appeal relates only to the repair of the roads, so far as they lie over the bridges and approaches, for it is conceded that the appellants are liable to maintain and repair the approaches and the bridges apart from the roads. No issue is raised as to the standard of repair, and it does not seem to be in dispute that the liability of the appellants, if it exists, is to maintain the roads over the bridges and approaches in the state in which such roads respectively were at the dates of their completion under the Act on the principle laid down by this House in the *Sharpness* case. (1) The judgment under appeal contains a declaration as to the liability of the appellants which is so limited. We have not the advantage of reading any reasoned judgments either of Luxmoore J. before whom the case first came or of the Court of Appeal, for it was conceded that both Courts were bound to follow decisions of Parker J. and of the Court of Appeal pronounced a quarter of a century ago in the case of *Attorney-General* v. *Midland Railway Company*. (2) Those judgments related to the true construction of a railway Act (6 & 7 Will. 4, c. cxii.) which contained sections so similar in form to ss. 31, 34 and 35 under consideration in the present case that this appeal in effect seeks to over-rule that authority.

My Lords, the question is one of the interpretation of a statute couched in somewhat elliptical terms by which provision is made for a case in which persons, acting under the authority of a statute for their own purposes, interrupt or alter a highway

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(1) *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* [1915] A. C. 654.

(2) 99 L. T. 961 ; 100 L. T. 866.

Lord Maugham.

and are compelled to substitute works necessary to restore the highway so interrupted to public use. Except for the phrase that (taking the words appropriate to the present case) the highway " shall be carried over the railway at the expense of the Company by means of a bridge " there are no words expressly requiring the Company to construct and to maintain the bridge and its approaches. Still less are there any words in plain terms providing for the construction and repair of the road as an entity separate from the approaches and the bridge.

There are two possible views of ss. 31 to 38. The one is that they contain a sort of code of the rights and liabilities of the persons or bodies concerned in relation to the subject matter dealt with, in which case the provisions in the sections cannot be added to or modified by common law doctrines. The other is that the sections are intended only as a partial statement of those rights and liabilities, leaving matters not provided for either expressly or by necessary implication to be determined by the common law. Counsel for the appellants was bound to contend for the first alternative, for it is, I think, settled by authority that if the statute is silent the common law would throw upon the persons who have interrupted a highway under statutory authority an obligation at their own expense to restore to the public the use of the highway and to maintain it in a proper condition. The criticism which Lord Dunedin made in regard to a dictum of Fletcher Moulton L.J. in the case of *Hertfordshire County Council* v. *Great Eastern Ry. Co.* (1) was only that the dictum was " too broadly expressed as it would import a common law obligation running side by side with the expressed statutory obligation." He did not question the common law doctrine: the *Sharpness* case. (2) It may be noted that Lord Haldane (3) and Lord Parker (4) both took the same line. Lord Haldane in his dissenting judgment in *Attorney-General* v. *Great Northern Ry.* (5) stated his view of the common law principle in clear terms and I do not gather that on this point the other noble

(1) [1909] 2 K. B. 403, 412.
(2) [1915] A. C. 654, 663.
(3) [1915] A. C. 662.
(4) Ibid. 669.
(5) [1916] 2 A. C. 356, 369.

Lords differed from him. The appellants, however, as I have said, based their contention on the view that the relevant sections form a code. They admit the original liability of the Company to construct the approaches, the bridge and the road. This liability must be derived from the statement in s. 31 that the road is " to be carried " at the expense of the Company by means of a bridge.

Further they admit their continuing liability to repair and maintain both approaches and bridge. This liability is to be inferred from a continuing obligation to carry the road by means of a bridge. They seek, however, to discriminate between the road or the surface of the road and the approaches and bridge, and that without any words whatever which would justify such a discrimination. I can see no ground for such a discrimination in the present circumstances. Sect. 31 must be read in connection with s. 35. The bridge is to be one for the purpose of carrying a public carriage road and at all times it is to be " continued " of a defined width. The bridge, therefore, is to be a means of transit for carriages, and in my opinion, the railway Company would not be maintaining the bridge in the true sense of that word if the substructure were sound but the road were to be so founderous as to be impassable. That view derives great force from the decision of this House in the case of *Lancashire and Yorkshire Ry. Co.* v. *Mayor, etc., of Bury.* (1) The section which fell to be construed in that case was s. 46 of the Railways Clauses Consolidation Act, 1845. I find in the speech of Lord Herschell very strong confirmation of the view that a road over a bridge is naturally spoken of and considered as part of the bridge and that an obligation to maintain a bridge contained in such an Act as we are now considering, whether it is express or implied, would naturally extend to the road without which the bridge itself would be useless.

My Lords, the conclusion at which I have arrived is the same as that which Parker J., Cozens Hardy M.R. and Buckley and Kennedy L.JJ. reached with unanimity in the case of *Attorney-General* v. *Midland Ry. Co.* (2) already referred

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(1) 14 App. Cas. 417.

(2) 99 L. T. 961 ; 100 L. T. 866.

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to. Speaking for myself I prefer the way in which Parker J. stated the grounds for his decision in a considered judgment. I see no reason for thinking that the learned judge placed too much weight on s. 73 and too little on s. 70 (the sections equivalent to ss. 35 and 31 in the present case). He was, I think, rightly treating the relevant sections as a code and therefore as sections to be construed together.

For those reasons I concur in the opinion that this appeal fails.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, Feb. 10, 1936.

Solicitor for appellants: *I. B. Pritchard.*

Solicitors for respondents: *Lambert & Hale, for Hubert G. Thornley, Northallerton.*

[HOUSE OF LORDS.]

H. L. (E.)*
1936
March 2.

WILLIAMSON . . . . APPELLANT;
AND
OUGH (INSPECTOR OF TAXES) . . . . RESPONDENT.

Revenue—Income Tax—Will—Residuary bequests of income—Power to make payments out of capital or income on account and in advance of income—Discretion of Trustees—Payments made out of capital—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D.*

A testator by his will, after bequeathing an annuity to his wife for life as a prior charge upon his estate, directed the surplus income to be divided in equal shares between his wife and his three daughters. He authorized his trustees during the life of his wife to make payments on account of income to the persons for the time being entitled to the income of the trust fund, such payments in advance of income not to exceed a certain sum in respect of each share, but to be made out of money in the hands of the trustees whether representing capital or income and to be charged against income, any payment made out of capital to be recouped so far as practicable as and when the trustees should think fit:—

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* *Present:* VISCOUNT HAILSHAM L.C., LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD ROCHE.

Held, that a recipient of payments made under this power on account and in advance of income, but in fact made out of capital, was chargeable in respect thereof to income tax under Sch. D.

APPEAL from an order of the Court of Appeal.

By his will dated May 4, 1917, C. E. Hunter, who died on May 16, 1917, bequeathed an annuity of 6000*l.* to his wife for her life as a prior charge on his estate. The surplus income was to be divided in equal shares between the widow and the testator's three daughters. After the death of the widow each daughter was to receive an equal share of the income for life and after her death her share was settled on her children.

By clause 16 of the will the following power was conferred upon the trustees of the will: " During the lifetime of my wife my trustees may at their discretion make payment on account of income to the persons for the time being entitled to the income of the trust fund notwithstanding that my trustees may have no available income in their hands or not sufficient for the purpose but such payments in advance of income received shall not exceed 500*l.* for each quarter of a year in respect of each share of income and such payments may be made out of any money for the time being in the hands of my trustees whether representing capital or income of the trust fund but so that the same shall be duly charged against income and any payment made out of capital shall so far as practicable and as and when my trustees shall think proper be duly recouped."

By clause 20 the trustees were empowered by mortgage or charge of any part of the estate to raise any sum or sums for any purpose of or under the will " including the payment under clause 16 hereof of any sums in advance of income."

The estate consisted largely of shares in colliery companies, which so decreased in value after the testator's death that by the year 1927 the beneficiaries were left without any income

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therefrom. The trustees thereupon obtained an order of the Court on March 21, 1927, enabling them to make from November 16, 1926, to June 15, 1928, quarterly payments of 500*l.* each in advance on account of income to the widow and the three daughters and for that purpose to raise such sums not exceeding in the whole 10,000*l.* as might be necessary for that purpose out of the capital of the estate by mortgage or charge of any investments in their hands. The trustees raised that sum by pledging 78,912 ordinary shares in a colliery company which formed part of the capital of the estate.

Out of the sum of 10,000*l.* so raised, the trustees paid Mrs. Phyllis Williamson, one of the daughters of the testator, the following sums :—

In May, 1927	500*l.*
In June	300*l.*
In August	200*l.*
In November	500*l.*
In February, 1928 ...	500*l.*
In May	500*l.*

No recoupment in respect of these sums had ever been made.

Mrs. Williamson was assessed to income tax in respect of the 2000*l.* so paid to her for the year ending April 5, 1928, and in respect of the further sum of 500*l.* paid to her for the year ending on April 5, 1929. She appealed against these assessments. The Commissioners for the Special Purposes of the Income Tax Acts confirmed these assessments, but stated under s. 149 of the Income Tax Act, 1918, a special case for the opinion of the High Court.

Before the special case came on for hearing the testator's widow died, and her annuity of 6000*l.* thereupon ceased.

On the hearing of the special case Finlay J. reversed the determination of the Special Commissioners on the ground that the sums paid to Mrs. Williamson were not payments of income but were paid by way of loan to be repaid by her if and when circumstances made repayment possible. From this decision the Inspector of Taxes appealed to the Court of

Appeal. That Court (Lord Hanworth M.R. and Slesser L.J., Romer L.J. dissenting) reversed the decision of Finlay J. and held that the payments were made as payments of income and not as loans to be repaid by Mrs. Williamson.

Mrs. Williamson then appealed to this House.

1936. Feb. 6. *Cyril Radcliffe K.C.* and *John Sparrow* for the appellant.

Feb. 7. *Sir Thomas Inskip A.-G.*, *J. H. Stamp* and *R. P. Hills* for the respondent.

Radcliffe K.C. replied.

The House took time for consideration.

March 2. LORD RUSSELL OF KILLOWEN. My Lords, I am authorized to say that my noble and learned friends the Lord Chancellor, Lord Blanesburgh, and Lord Roche, concur in the opinion which I am about to deliver.

My Lords, the question here in dispute is whether the appellant is liable to be assessed to income tax in respect of two sums of 2000*l.* and 500*l.*, the assessments being made upon her under Sch. D of the Income Tax Act, 1918, for the years ending April 5, 1928, and April 5, 1929, respectively.

The appellant's father, Charles Edward Hunter, died on May 16, 1917. By his will he appointed his wife, Mary Emma Hunter, and two other persons his executors and trustees, and by the joint operation of clauses 8 and 9 thereof bequeathed free of duty to his wife an annuity of 6000*l.* for her life, payable quarterly, to be a charge on the residue of his estate, unless and until an annuity fund to provide for it was constituted by the trustees of the will. By clause 11 the testator devised and bequeathed to his trustees all the residue of his real and personal estate not otherwise specifically disposed of by his will upon the usual trusts for sale and conversion, and after the usual directions for payment of funeral and testamentary expenses and debts and pecuniary legacies he (by clause 13) directed his trustees to stand possessed of his residuary trust fund and the annual income thereof (*a*) upon certain trusts for accumulation of surplus annual income exceeding 20,000*l.* during the first fourteen years after his death, which are not material hereto, and subject thereto (*b*) during the lifetime of his wife upon trust to divide and pay the income of the trust fund equally between his wife and such of his three daughters, the appellant, Mrs. Kathleen Cary Elwes and Lady (Sylvia) Grant-Lawson, as for the time being should be living and the issue of such of them as should then be dead leaving issue, as therein directed, and (*c*) after the death of his wife upon trust as to both capital and income for the testator's three daughters in equal shares, the share of each daughter being settled upon trusts for her and her issue.

By clause 16 the testator conferred the following power on his trustees :—

" During the lifetime of my wife my trustees may at their discretion make payment on account of income to the persons for the time being entitled to the income of the trust fund notwithstanding that my trustees may have no available income in their hands or not sufficient for the purpose, but such payments in advance of income received shall not exceed 500*l.* for each quarter of a year in respect of each share of income, and such payments may be made out of any money for the time being in the hands of my trustees whether representing capital or income of the trust fund, but so that the same shall be duly charged against income and any payment made out of capital shall so far as practicable and as and when my trustees shall think proper be duly recouped."

By clause 20 the testator declared that notwithstanding the trust for sale and conversion of his residuary estate contained in his will his trustees might if they thought proper raise any sum or sums for any purpose of or under his will " including the payment under clause 16 hereof of any sums in advance of income " by mortgage or charge of any part or parts of his estate.

The testator was survived by his wife and his said three daughters.

By the year 1927 the income of the residuary trust fund (which consisted in large part of colliery shares) had become so reduced that the beneficiaries were left practically without income therefrom. In those circumstances the trustees (with the authority of an order of Court) exercised their powers under clause 16 of the will. They raised a sum of 10,000*l.* from their bank on the security of certain colliery shares which formed part of the capital of the estate. Out of the moneys so raised they paid to the appellant 2000*l.* during the financial year ending April 5, 1928, and 500*l.* during the next financial year. These are the payments which are the occasion of the present dispute. Similar payments were made to the widow and the other two daughters.

The appellant having been assessed to Income Tax in respect of these two sums appealed; but the Special Commissioners confirmed the assessments, and on the requirement of the appellant stated and signed a case (dated November 1, 1933) for the opinion of the High Court.

Before the case came before the High Court for hearing the testator's widow died and the annuity of 6000*l.* per annum payable to her under his will thereupon ceased. At the date of her death there were unpaid arrears of her annuity amounting to 2800*l.* 1*s.* 4*d.*, but on the other hand no recoupment had taken place in respect of the 2500*l.* paid to her under clause 16 of the will. The trustees of the testator's will accordingly took out an originating summons in the Chancery Division raising the question whether the unpaid arrears of annuity in their hands were applicable by them (inter alia) in discharging one-fourth of the debt of 10,000*l.* and the unpaid interest and bank charges thereon. By his order made on the hearing of that summons dated November 30, 1933, Bennett J. declared that the unpaid arrears of the annuity were so applicable.

The stated case was heard by Finlay J. who by his order dated March 28, 1934, reversed the determination of the Commissioners. The present respondent then appealed to the Court of Appeal, and by an order of that Court (dated June 28, 1934) the appeal was allowed and the determination of the Special Commissioners was restored. Romer L.J., however, delivered a dissenting judgment. The Master of the Rolls and Slesser L.J. both were of opinion that under clause 16 of the will the trustees were empowered to make payments to the beneficiaries so as to secure them an income in any event, that the payments did not create any debt from them, and that the provision for recoupment merely enabled the trustees if they thought fit to replace out of future income capital which had been used in making payments under the clause. The payments were accordingly income in the hands of the present appellant.

My Lords, I agree with this construction of the clause. The judgments both of Finlay J. and Romer L.J. are based upon the view that there was a personal liability upon the appellant to repay the moneys paid to her by the trustees in exercise of the powers conferred by clause 16. Finlay J. puts it thus: "I have come to the conclusion, and in so deciding I think that I am deciding in accord with the view expressed by my brother Bennett, that this money was money which the trustees were entitled to reclaim. . . . . The lady was entitled to . . . . income. The source temporarily dried up. Therefore in order to tide her . . . . over what was obviously an embarrassing position, it was arranged that she should be given not income but a loan to be repaid if circumstances arose which made it possible that it should be repaid." Though Finlay J. leaves it uncertain when repayment could be exacted, the relation of debtor and creditor is made clear.

Romer L.J. arrives at the conclusion that any beneficiary, who has received payments from the trustees in the exercise of the powers conferred by clause 16, is personally liable to repay to the trust estate the amount by which on her death it is ascertained that the payments which she has received from the income of residue and her receipts under clause 16 exceed her share of the income actually earned by residue during her life. This liability arises, according to him, not under the words of the clause, but by general law the operation of which was not excluded by the clause. "I see nothing in those words," he says in reference to the recoupment provision, "to exclude the case from the ordinary operation of law, which would create an obligation to repay a sum paid in

Lord Russell of Killowen.

advance of income when it appears in the end that the sum so advanced exceeds the income to which the person who obtains the advance was entitled." This view of the Lord Justice, that an obligation to repay arose from operation of law, is founded upon the construction which he placed upon clause 16, and can, I think, only be supported if that construction is right. It is the keystone of the judgment.

The construction which he placed upon the clause can best be stated in his own words: "The clause," he says, "does not in my opinion enable those beneficiaries to receive one penny more of income from the estate than they would in its absence; that is to say, it does not entitle them in the end to receive one penny more in respect of income from the testator's estate than they would in the absence of the clause." If this be the true view, it may be (I say no more than that) that the law would imply a personal liability to repay. But if the clause on its true construction means that sums can be paid under it out of capital to life tenants, and that the only recoupment to capital is to be made out of future income in the discretion of the trustees, there is no basis on which to establish personal liability either expressly under the clause or by implication under the general law.

My Lords, in my opinion that is the true construction of clause 16. It empowers the trustees when income is not available to provide out of capital payments to a limited amount to supply the place of the absent income. The payments, however, are to be "duly charged against income," that is to say, each life tenant is to be debited in her income account with the moneys which she receives under the clause; and in addition there is the provision as to recoupment which only requires recoupment "so far as practicable" and further only "as and when my trustees shall think proper." These words appears to me to exclude all idea of a personal liability to repay attaching to the recipients; they leave the corpus of the share to bear the burden, unless future income becomes available and the trustees deem it proper to recoup corpus thereout.

My Lords, I think it true to say that the existence of this personal liability was not the principal argument of the appellant in your Lordships' House; but I have dealt with it first because, as I conceive, it was the foundation of the judgments in favour of the appellant. The main argument here was that if (without any personal liability) there existed a liability so to speak in rem, that is to say, that if the payments made under clause 16 were made upon the footing that the future income of the recipient under the trust might be taken to recoup capital, then the payments so made could not form income in the hands of the appellant assessable to income tax. No authority was cited in support of this contention; and I know of no legal principle to justify it. It is well settled that a payment out of corpus may properly be assessable income in the hands of the recipient. A familiar instance is the case of an annuity charged on the income and corpus of an invested fund; all moneys raised out of corpus to provide the amount of the annuity will be assessable income. The present case presents a close analogy; for clause 16 in effect, if and when the trustees choose to exercise their powers thereunder, secures to the life tenants an income from residue by means of a charge on the corpus thereof.

In my opinion the appellant has been rightly assessed and this appeal should fail.

LORD MACMILLAN. My Lords, I am in entire agreement both with the reasoning and with the conclusion of my noble and learned friend Lord Russell of Killowen.

Order complained of affirmed and appeal dismissed with costs.

Lords' Journals, March 2, 1936.

Solicitors for appellant: *Ellis, Peirs & Co.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

WHELAN (INSPECTOR OF TAXES) . . . APPELLANT;

AND

ALFRED LENEY AND COMPANY, LIMITED . . . . RESPONDENTS.

LOUGHNAN (INSPECTOR OF TAXES) . . APPELLANT;

AND

MARSTON'S DOLPHIN BREWERY, LIMITED . . . . RESPONDENTS.

H. L. (E.)*

1936

March 9.

Revenue—Income Tax—Licensed premises—Lease of tied house with exclusive right to supply beer—Lease of brewer's business—Rent in Excess of Sch. A Assessment—Assessment under Sch. D—Rent whether divisible.

A brewery company who held a number of tied houses, both freehold and leasehold, by several agreements and deeds agreed to grant and subsequently granted leases of the houses, with the plant and fixtures connected with their brewery and the exclusive right to supply beer to the tied tenants, to another brewery company for a term of years at a rent fixed by reference to the average net profits of the lessors for a period of years. Another brewery company by an instrument purporting to be a lease agreed to transfer their tied houses and brewery business together with the benefit of all covenants in connection with the premises and the right to use their trade marks, trade labels and advertisements, to a firm of brewers for a term of years at a yearly rent. The tied houses comprised in the agreements and leases were assessed to income tax on their annual values under Sch. A, and the tied tenants of these houses deducted the tax paid by them from the rent they paid to the lessees, who in turn deducted the same amount from the rent they paid the lessors under the agreements and leases. The aggregate amount of the rents paid under the agreements and leases over a period of years exceeded the aggregate amount of the assessments under Sch. A of the annual value of the tied houses over the same period:—

Held, that the lessors having paid the tax under Sch. A were not liable to tax under Sch. D in respect of the surplus except so so far as, in the second case, it represented personal goodwill, user of trade marks, trade labels and advertisements and other property not being corporeal hereditaments.

**Present:* VISCOUNT HAILSHAM L.C., LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD ROCHE.

Fry v. *Salisbury House Estate, Ld.* [1930] A. C. 432 applied.
Decision of the Court of Appeal [1934] 2 K. B. 511 affirmed.

WHELAN *v.* ALFRED LENEY AND COMPANY, LIMITED.

APPEAL from an order of the Court of Appeal. (1)

The facts are stated in the judgment of Lord Russell of Killowen. The following is a summary:—

Alfred Leney & Co., Ld., the respondents (hereinafter called "Leneys"), for many years carried on the business of brewers, in connection with which they held a number of freehold and leasehold houses licensed for the sale of intoxicating liquors and let to tied tenants. They had a brewery at Dover at which they brewed beer for sale to the tenants of the tied houses. In October, 1926, by agreements and afterwards by formal deeds they leased their tied houses with the exclusive right to supply the tenants thereof with beer for a term of thirty-six years from October 1, 1926, to Fremlin Brothers, Ld., at a rent fixed by reference to the average net profits of the lessors during a period of three years. From October, 1926, Fremlin Brothers, Ld., began to supply beer to the tenants; and they and their successors, Fremlins, Ld., continued to supply beer to the public through the medium of the tied houses formerly supplied by Leneys.

The tenants of the tied houses were assessed to income tax under Sch. A on the annual value thereof as occupiers, and when paying their rents to Fremlin Brothers, Ld., or Fremlins, Ld., they deducted therefrom so much of the tax as is permitted by No. 8, r. 1, of the Rules applicable to Sch. A; and Fremlin Brothers, Ld., or Fremlins, Ld., in turn, when paying to Leneys the rent reserved by the agreements and deeds mentioned above, deducted the amount of tax which had been deducted by the tenants. The sums actually paid by Fremlin Brothers, Ld., or Fremlins, Ld., to Leneys by way of rent under the agreements and deeds amounted in the aggregate in the six years ending on September 30, 1932, to 20,000*l*. The assessments of the net annual value of the demised properties made for the purposes of Sch. A amounted during the same period to 5500*l.*

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(1) [1934] 2 K. B. 511.

The question was whether Leneys were assessable to income tax under Sch. D in the amount by which 20,000*l.* exceeds 5500*l.*

Leneys having been assessed to income tax under Sch. D on that amount appealed to the Special Commissioners, who confirmed the assessment; but at the request of Leneys stated a case under s. 149 of the Income Tax Act, 1918, for the opinion of the High Court. The special case, which is set out in full in the report of the hearing in the Court of Appeal (1), was heard by Finlay J., who affirmed the decision of the Special Commissioners.

Leneys appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Slesser and Romer L.JJ.) reversed the decision of Finlay J.

The Inspector of Taxes appealed to this House.

LOUGHNAN *v.* MARSTON'S DOLPHIN BREWERY, LIMITED.

Appeal from an order of the Court of Appeal.

This case raised substantially the same point as that in issue in *Whelan* v. *Alfred Leney & Co.*

Marston's Dolphin Brewery, Ld. (hereinafter called "the Dolphin Company"), until November 15, 1926, carried on the business of brewers, merchants of wine and spirits and manufacturers of mineral waters in Hampshire and Dorsetshire. They owned a brewery and a number of licensed houses let on annual tenancies tied to the Dolphin Company or their nominees for all malt liquors, wines, spirits and mineral waters.

In 1926 the Dolphin Company made an agreement with another company, Strong & Co., whereby they agreed to transfer their business to Strong & Co. for a term of thirty-five years. The instrument, called a lease, by which this agreement was carried out purported to transfer to Strong & Co. for the term aforesaid the whole of the licensed premises belonging to the Dolphin Company and the goodwill of the business carried on therein together with the benefit of all covenants in restraint of trade and other covenants to the benefit of which the Dolphin Company was entitled in connection with all or any of the said premises, together with the right to use trade marks, trade labels and advertisements used in their business. The consideration for the transfer was a yearly rent of 20,000*l.* payable without any except immaterial deductions by equal half-yearly payments on the first day of January and July in every year. There followed a number of covenants by the lessees (Strong & Co.) and the Dolphin Company which are not material to the question at issue.

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(1) [1934] 2 K. B. 511 et seq.

Assessments to income tax under Sch. D were made upon the Dolphin Company for the five years ending on April 5, 1930, in respect of so much of the annual sum of 20,000*l.* as was said to be derived from sources other than rent of the corporeal hereditaments demised by the so-called lease, and therefore not to be covered by the assessments of the annual value of those hereditaments made upon the occupiers thereof under Sch. A, which last mentioned assessments amounted in the aggregate to 5276*l.* and no more.

The Dolphin Company appealed against the assessments made under Sch. D. The Special Commissioners confirmed the assessment in principle, but postponed giving a final decision in order that the parties might agree upon the portion of the 20,000*l.* attributable to the subject matter of the lease other than the corporeal hereditaments. The parties being unable to come to an agreement, the Special Commissioners fixed the amount so attributable at 15,000*l.* At the request of the Dolphin Brewery a special case was stated for the opinion of the High Court.

The stated case was heard before Finlay J., who affirmed the decision of the Special Commissioners.

The Dolphin Company appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Slesser and Romer L.JJ.) allowed the appeal and remitted the case to the Special Commissioners for them to reconsider their decision in the light of the previous decision of the Court in *Alfred Leney & Co.* v. *Whelan.*

The Inspector of Taxes appealed to this House.

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1936. Jan. 31. *Sir Donald Somervell S.-G.* and *R. P. Hills* for the appellants respectively in both appeals. The Special Commissioners have found that the sum of 20,000*l.* in *Whelan's* case was paid not solely for "hereditaments" within the meaning of Sch. A, but for the benefit of the tying covenants and the goodwill and business connection of that company. In arriving at the assessment under Sch. A the profits which brewers can make by the use of tied houses, and the higher price which they would be prepared to pay for a house because it was tied, were properly excluded. The payments received by the respondents included this element, which is a profit chargeable under Sch. D.

Feb. 3. *A. M. Latter K.C.* and *Cyril King* for the respondents in both cases. These cases fall within the principle of *Fry* v. *Salisbury House Estate, Ld.* (1) The subjects demised in the cases were corporeal hereditaments and nothing else, and the payments received by the respondents as lessors under the agreements or leases were true rents issuing out of those corporeal hereditaments leased or agreed to be leased—namely, the tied houses. The covenants by which the tenants of those houses bind themselves to take all beer or other intoxicating liquors from the landlords are restrictive covenants the benefit of which runs in each case with the reversion on the tenancy and is assignable therewith ; and it is not disputed that the ties are enforceable by Fremlin Brothers, Ld., or Fremlins, Ld., their successors, while they are assignees of the reversion expectant on the terms granted to the tied tenants. These covenants are part and parcel of the demised premises, the tied houses. The fact that they are tied may increase the rent which a brewer would give for a lease of them, but that will not alter the character of the rent he would pay. So with regard to the goodwill and business connection ; that must mean the goodwill of the houses, which no doubt will enhance the value of the houses in the eyes of a prospective landlord, but does not alter the nature of what he would be prepared to give for an assignment of the reversion. In truth the appellant would exact one tax for the value of a tied house and another for the tie or the goodwill of the house.

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(1) [1930] A. C. 432 ; 15 Tax Cas. 266.

Feb. 4. *Sir Donald Somervell S.-G.* replied.

The House took time for consideration.

March 9. LORD RUSSELL OF KILLOWEN. My Lords, it will be convenient to deal first with the appeal which relates to the assessment of Alfred Leney & Co., Ld., to whom I will refer as Leneys. The matter for decision is whether Leneys are assessable to income tax under Sch. D of the Income Tax Act, 1918, in respect of the amount by which the aggregate rents payable to them under leases of premises demised by them exceed the amounts of the aggregate annual values of the same premises as assessed to tax under Sch. A. The Commissioners having assessed Leneys under Sch. D, their assessment was confirmed by the Special Commissioners, whose determination was affirmed by Finlay J. An appeal from his order was allowed, and the determination of the Special Commissioners was reversed by the Court of Appeal. Hence the appeal to your Lordships' House.

I need not recapitulate the facts in any great detail. Leneys were brewers with a brewery at Dover. They owned a number of freehold and leasehold properties, the majority of which were licensed houses, let to tied tenants. I will refer later to the nature of these tied tenancies. In the year 1926 they were minded to retire, at any rate for a time, from the business of brewing, and on October 18, 1926, they entered into an informal agreement with a company called Fremlin Brothers, Ld., who also were brewers, under which Fremlin Brothers, Ld., were to take a lease of all Leney's freehold and leasehold properties including plant and fixtures (except their mineral water and cordial factories and buildings) for a term of thirty-six years from October 1, 1926, at a rent equivalent to the average net profits of Leneys for the three years ending September 30, 1926, subject, however, to modification and to reductions as therein mentioned. It is unnecessary to consider this agreement in further detail. It was superseded by four formal agreements for leases each dated June 21, 1928, one covering the unencumbered freeholds and long leaseholds, a second covering the encumbered freeholds and long leaseholds, a third covering the unencumbered short leaseholds and a fourth covering the encumbered short leaseholds. These agreements, it will be noticed, are some twenty months later in date; but ever since the execution of the informal agreement Fremlin Brothers, Ld., had supplied beer to the tied tenants, Leney's brewery having been closed down in December, 1926.

The rents had been calculated and ascertained in respect of each of the four blocks of properties respectively comprised in the four formal agreements, and the appropriate sum for rent so ascertained was inserted in the form of lease which was scheduled to each of those agreements.

The leases which were in fact granted in pursuance of those agreements, were not granted to Fremlin Brothers, Ld., but to assignees of their assets and business—namely, another limited company called Fremlins, Ld. Nothing however turns upon that, or upon the fact that the properties were divided into four blocks. The total aggregate of the rents received under the four leases over a period of six years averaged approximately 20,000*l*. The aggregate of the annual values of the properties comprised in the four leases (arrived at by adding together all the individual Sch. A assessments) averaged over the same period about 5500*l*.

Assessments to income tax were made upon Leneys under Sch. D in respect of the amount by which the payments received by them under the leases exceeded the aggregate annual values as appearing in the Sch. A assessment. On appeal to the Special Commissioners, they held that the assessments should be confirmed on the grounds (stated shortly) that the benefit of the tying covenants had been transferred to the lessees, that the transfer of this trading connection with the tied tenants was the primary object of the arrangement, that the profits which a brewer could make by the use of the premises as tied houses, and the enhanced rent he would be prepared to give to secure those profits, were not and could not be reflected in Sch. A assessments, that therefore the payments received by Leneys under the leases included an element not included for purposes of taxation under Sch. A, and that therefore that element was a profit chargeable to tax under Sch. D.

On request they stated a case which came on for hearing before Finlay J., who affirmed their decision.

The learned judge said that two distinct things were sold—namely, (1.) the reversions and (2.) the right to supply liquor to the tied houses; that the second was property outside the ambit of the Sch. A assessment; that while Leneys received something as landlords, they received also what was really a trade receipt as brewers. The learned judge did not in terms say how much was received in each capacity, but since he affirmed the determination of the Special Commissioners it must be presumed that the receipt as landlords was so much of the rent reserved by a lease as was equivalent to the aggregate of the individual Sch. A assessments of the properties thereby demised.

An appeal to the Court of Appeal resulted in a reversal of the determination of the Special Commissioners and an order for repayment of the tax paid with interest. In the opinion of the Court of Appeal the rents payable were payable for the hereditaments demised and for nothing else and that consequently no assessment to tax under Sch. D was permissible.

My Lords, I entertain no doubt that the decision of the Court of Appeal was correct. The Crown's case is that the rent is not paid for the land alone, but is paid partly for the ties affecting the licensed houses as matters which could be separated from the property in the land, i.e., from the ownership of the reversion expectant on the determination of the tenants' interest. This portion of the rent is, they say, a profit or gain which does not arise from property in land assessable under Sch. A, but is a profit or gain assessable under Sch. D.

In my opinion this contention is wrong from start to finish.

Let me call attention (taking it merely as a sample) to the lease of Leneys unencumbered short leaseholds, and to the sample tenancy agreement which was put in evidence. The lease is a sub-lease for the terms held by Leneys less three days, at a yearly rent of 938*l.* 14*s.* 8*d.*, the parcels, so far as relevant to this appeal, being thus described: "All the land and premises specified in the Schedule hereto and the appurtenances thereof and the fixtures thereon subject to and with the benefit of the existing tenancies thereof." The description might have stopped with the word "hereto"; all that follows above merely describes consequences necessarily involved in the demise of the land. The lease contains a clause providing that if a house is sold or ceases to be licensed the proceeds of sale or compensation money shall if possible be applied in purchasing other licensed property which is to be deemed included in the Schedule and is to be demised without alteration of the rent.

Now consider the sample tenancy subject to which the lessee under this lease will hold the land thereby demised. Its duration is "until the tenancy shall be determined in any manner hereinafter mentioned," and clause 4 enables either party to determine it on three calendar months' notice in writing to expire on any day, except that the tenant cannot determine before one year from the commencement of the tenancy. The covenant tying the tenant so far as material runs thus:—

"To purchase from the landlords or their nominee or nominees and from no other company or companies person or persons all ale beer stout porter and other malt liquors cider whether in cask or bottle wines spirits cordials and mineral waters which may be received vended or consumed upon or out of the said premises during the tenancy at the prices set out in the Schedule hereto so far as the same are so set out and if and where not set out then at the landlord's usual list prices for tied houses for the time being and not during the said tenancy either directly or indirectly to buy receive sell or dispose of in upon out of or about the said house and premises or any part thereof or suffer to be brought thereon any ale beer stout porter or other malt liquor cider either in cask or bottle or any wines spirits cordials and mineral water except such as shall have been so purchased of the landlords or their nominee or nominees."

The word "landlords" includes the successors in title of the landlords and the word "tenant" includes the executors, administrators and assigns of the tenant. It would seem reasonably clear that the benefit of the tie and the reversion could not be disposed of separately. The landlord owning the reversion might name a nominee, and as long as he remained landlord he could enforce the covenant for the nominee's benefit; the nominee could not. But the moment the landlord sold the reversion the nominee would cease to be the landlord's nominee, and a refusal by the tenant to take liquor from a person who was neither the new landlord nor the new landlord's nominee would be no breach of the covenant. There is accordingly in my opinion nothing here which can be separated from the ownership of the land.

Now consider the value to the lessees of that tie for which the Crown contends that Fremlins are paying large sums as a matter apart from the land demised to them. It is worth nothing. It is at most a three months' tie, for the tenant can determine the tenancy on three months' notice. A new tie would have to be imposed on the new tenant. In these circumstances it seems to me impossible to say that anything is paid for the tie. The rent is paid for the land, the ownership of which carries with it the power to impose a tie if the existing tenancy determines and (by abstaining from determining the tenancy) to retain a tie if the sitting tenant is willing to remain. The lessee pays a rent in excess of the aggregate annual values assessed under Sch. A because of the profitable use which he the lessee (in the light, if you will, of Leneys experience) hopes to make of the land; and that rent is received by Leneys in respect of their property in land, and in respect of nothing else.

If that be so, then the case is concluded by the decision of this House in *Fry* v. *Salisbury House Estate, Ld.* (1) When

(1) [1930] A. C. 432.

once profits and gains arising from property in land have been charged to income tax under Sch. A, no further income tax can be charged in respect of those profits and gains. If, however, the owner of the land carries on upon the land some activities, which result in profits and gains arising, not from property in the land, but from the owners' user thereof, those profits and gains may be chargeable to income tax. Instances of such user and chargeability will be found in the *Salisbury House* case (1), and in the *Rotunda* case. (2) In the present case, however, Leneys carry on no activities on the land; they are not in possession; they do nothing but receive the rents as owners of the reversions expectant on the determination of the four leases to Fremlins.

I am of opinion that the appeal in the case of Leneys fails, and should be dismissed with costs.

In the case of *Marston's Dolphin Brewery, Ld.*, the facts are a little different, but the result must be the same.

In that case there was only one lease, for thirty-five years, at a single rent of 20,000*l*. The parcels demised ran thus: "All and singular the lands, buildings and hereditaments respectively described and specified in the Schedule hereto, together with the goodwill of the businesses carried on thereon respectively and the licences connected therewith and the benefit of all covenants in restraint of trade, trading and other covenants to the benefit of which the Company is entitled in connection with all or any of the said premises And together with the right to sign the name of the Company in requiring the tenants of the premises to deal exclusively with the lessee as the nominee (as it is hereby appointed) of the Company for all ale, beer, porter, stout and malt liquors, cider, perry, wines, spirits, mineral waters and other goods in accordance with the terms of the holdings of the said tenants as tenants of the Company's premises. Together also with the right to use in connection therewith all trade marks trade labels and advertisements used by the Company in connection with the said businesses."

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(1) [1930] A. C. 432.

(2) *Coman* v. *Governors of the Rotunda Hospital, Dublin* [1921] 1 A. C. 1.

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From this it is apparent that the rent was reserved in respect of some matters other than the land. The Commissioners apportioned out of the rent of 20,000*l.* 100*l.* to the free trade of the brewery and 100*l.* to the goodwill of the mineral water business. Where a single rent is reserved in respect of several subject matters, some of which do not represent property in land, such apportionment is right and proper: *Campbell* v. *Inland Revenue.* (1) Ultimately the Commissioners fixed the sum of 15,000*l.* as being the portion "attributable to subject matters of the lease other than corporeal hereditaments." The Court of Appeal by their order reversed this decision, and remitted the case to the Commissioners for them to reconsider their decision in the light of the decision of the Court of Appeal in *Leney's* case (2), and to decide whether there was any and what part of the 20,000*l.* attributable to subjects included in the lease other than corporeal hereditaments, with a particular reference to personal goodwill, and the user of trade marks, trade labels and advertisements. It was intimated to us that the parties would probably be able to come to an agreement without any reconsideration by the Commissioners; but in any event the order of the Court of Appeal must stand, and the appeal therefrom should be dismissed with costs.

My Lords, I am authorized by my noble and learned friends the Lord Chancellor and Lord Blanesburgh to state that they concur in the opinion which I have just delivered.

LORD MACMILLAN. My Lords, I concur.

LORD ROCHE. My Lords, I also concur.

Orders complained of affirmed and appeals dismissed with costs.

Lords' Journals, March 9, 1936.

In *Whelan* v. *Alfred Leney & Co., Ld.*, and in *Loughnan* v. *Marston's Dolphin Brewery, Ld.*:—

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondents: *Godden, Holme & Ward.*

(1) (1879) 1 Tax Cas. 234.

(2) [1934] 2 K. B. 511.

Applied. BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY. [1950] 2 All E.R. 549.

[HOUSE OF LORDS.]

H. L. (E.)*

1936

March 12.

BETWEEN RUSSIAN AND ENGLISH BANK AND FLORANCE MONTEFIORE GUEDALLA . . . . . . APPELLANTS;

AND

BARING BROTHERS AND COMPANY, LIMITED . . . . RESPONDENTS.

Applied. BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY [1951] 1 Ch. 112

Company—Procedure—Russian Bank with London Branch—Dissolution by Russian law—Winding-up of company as an unregistered company—Action by liquidator in name of company—Company revived for purposes of liquidation—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 190; *s.* 191, *sub-s.* 1; *s.* 338, *sub-ss.* 1 (*d*), 2; *s.* 342.

A foreign company which after carrying on business in this country has been dissolved in the country of its incorporation may, notwithstanding its dissolution in that country, be wound up as an unregistered company under s. 338, sub-ss. 1 and 2, of the Companies Act, 1929, although the dissolution took place before the passing of that Act; and, with the leave of the Registrar in Companies Winding-up, on the instruction of the liquidator with the approval of the committee of inspection, an action may be brought in the name of the foreign company to recover sums which at the date of its dissolution were due to the company and unpaid.

So *held*, by Lord Blanesburgh, Lord Atkin and Lord Macmillan, Lord Russell of Killowen and Lord Maugham dissenting.

APPEAL from an order of the Court of Appeal (1) affirming an order of Clauson J. (2)

In October, 1917, the Russian Ministry of Agriculture having bought from Messrs. Jensen & Co. of Copenhagen seeds and other goods to the aggregate value of 186,980*l.* requested the Russian and English Bank to pay this sum. The Russian and English Bank was incorporated under Russian law on April 26, 1910, and carried on the business of banking, having its head office at Petrograd. In 1915 a branch office of this bank was established in London. Acting on the request of the Russian Ministry of Agriculture the Russian and English Bank, through their London Branch, paid to Messrs. Jensen & Co. the equivalent in kroner of 186,980*l.*

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* *Present:* LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD MAUGHAM.

(1) [1935] Ch. 127.

(2) [1935] Ch. 120.

To repay the London Branch of the Russian and English Bank the Russian Ministry of Agriculture obtained from the Chief Board of Foreign Supplies in Petrograd two instruments called "talons," having in Russian law the effect of absolute assignments, in favour of the London Branch of sums of 80,000*l.* and 100,000*l.* respectively. In exchange for these the Russian Ministry of Agriculture paid to the State Bank in Petrograd to the credit of the Ministry of Finance roubles to the value of 180,000*l.* and received two receipts for the same. The two "talons" and receipts were delivered by the Ministry of Agriculture to the Russian and English Bank, and by that Bank to the proper department of the Ministry of Finance. The Ministry of Finance cabled to Baring Brothers & Co. to pay to the London Branch of the Russian and English Bank, out of a fund known as the Compte Special belonging to the Russian Government and held by Baring Brothers & Co. on behalf of that Government, (*a*) a sum of 80,000*l.* and (*b*) a sum of 100,000*l.* These directions were sent to and received by Baring Brothers & Co. on or about October 31 and November 5, 1917; but they never paid the London Branch the sums named or any part thereof.

On March 23, 1921, a writ was issued in the Chancery Division in the name of the Russian and English Bank (hereinafter called "the Bank") against Baring Brothers & Co. claiming the two sums of 80,000*l.* and 100,000*l.* and interest. The Attorney-General was at his request made a defendant to the action. Great difficulty was encountered and much delay incurred in procuring evidence, and many other proceedings were pending in the Courts concerning rights and liabilities of Russian Banks since the Russian Revolution of 1917. At a date not later than January 26, 1918, the Bank was dissolved in Russia, but the London Branch carried on business in this country until June, 1920. Not until April, 1931, were the Bank's solicitors ready to give notice of trial.

On June 18, 1931, Baring Brothers & Co. took out a summons to stay the action on certain grounds. The summons was heard by Eve J. In the course of the hearing it was admitted by counsel for the plaintiffs that the Bank had ceased to exist as a corporation in Russia before the issue of the writ. Thereupon the learned judge stayed the action indefinitely, but suggested that under s. 338, sub-s. 2, of the Companies Act, 1929 (1), proceedings for winding up the Bank might still be competent. (2)

Thereupon a petition to wind up the Bank was presented and was heard by Bennett J., who held that although the Bank was dissolved in Russia before November, 1929, he still had jurisdiction to wind it up under s. 338, sub-s. 1 (*d*) (i.), of the Companies Act of 1929. (3)

On March 8, 1932, the learned judge made an order winding up the Bank, and on July 20 Edward Moloney, of 11 Ironmonger Lane, Chartered Accountant, was appointed liquidator with a committee of inspection.

The liquidator then applied to the Court to remove the stay imposed by Eve J. upon the action. The motion was heard by Bennett J., who held that the action was dead for want of a plaintiff to maintain it, and dismissed the motion. (4)

Leave having been obtained for the purpose from the Registrar in Companies Winding-up, on the instructions of the liquidator with the approval of the committee of inspection, an action in the name of the Bank was brought in the Chancery Division by Messrs. F. M. Guedalla & Co. as solicitors for the Bank against Baring Brothers & Co. claiming a declaration that the Bank were assignees of two sums, one of 80,000*l.* and the other of 100,000*l.*, forming part of the Compte Special held by the defendants Baring Brothers & Co., with interest thereon from November 5 and November 7, 1917, respectively; administration, if necessary, of the Compte Special, and payment of the amount found due. The Solicitor to the Treasury informed the liquidator that the Crown did not desire to be a party to the action.

On July 18, 1934, the defendants took out a summons against the Bank and F. M. Guedalla & Co. for an order staying the proceedings in this action on the ground that the Russian and English Bank was a dissolved corporation. On October 9, 1934, Clauson J. made an order staying the proceedings and directing that Messrs. F. M. Guedalla & Co. should pay the costs thereof. The learned judge held that the power conferred by s. 191 of the Companies Act, 1929 (1), upon a liquidator to bring an action in the name of the company in a winding-up enabled him to recover such assets only as the company suing in its own name could recover.

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(1) See p. 414 post.

(2) [1932] 1 Ch. 435.

(3) [1932] 1 Ch. 663.

(4) [1934] Ch. 276.

The Russian and English Bank appealed. The Court of Appeal (Slesser and Roche L.JJ.) dismissed the appeal. (2)

The Russian and English Bank and F. M. Guedalla appealed to this House.

1935. Oct. 29. *Lionel Cohen K.C.* and *H. Wynn Parry* for the appellants. The action was well constituted and is authorized by the Companies Act, 1929. The appellants are an "unregistered company" within the meaning of s. 337 of that Act. That section includes any association and any company with certain exceptions, of which one only is material as indicating that foreign companies are included. The exception is, in sub-s. 3, of "a partnership, association or company which consists of less than eight members and is not a foreign partnership, association or company"; implying that a foreign company, even if it consists of less than eight members, is included in the term "unregistered company." But this conclusion does not rest on implication alone, for by s. 338, sub-s. 2, it is enacted that "Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated." By s. 338, sub-s. 1, any unregistered company

(1) The relevant sections of the Act are set out in the speech of Lord Blanesburgh, post pp. 413—415.

(2) [1935] Ch. 127.

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may be wound up, and among the circumstances in which it may be wound up is—sub-s. 1 (*d*) (i.)—" If the company is dissolved." Thus for the purpose of being wound up the dissolved foreign company is reanimated. So far there is no difference between the judgments appealed from and the present argument.

But at this point the divergence occurs. The Court of Appeal were wrong in holding that s. 191, sub-s. 1, of the Act does not enable the liquidator of a dissolved foreign company to bring an action in the name of the company. Sect. 338, sub-s. 1, provides that " all the provisions of this Act with respect to winding-up shall apply to an unregistered company." Sect. 191, sub-s. 1, is thereby included : *Rudow* v. *Great Britain Mutual Life Assurance Society* (1) ; and by that sub-section the liquidator may bring any action in the name of the company. To give a consistent effect to the various sections of the Act it must be taken that for the purpose of being wound up a dissolved company is to be deemed to be still in existence.

Nov. 8. *Gavin Simonds K.C.* and *A. Andrewes Uthwatt* for the respondents. If a company, which was incorporated in a foreign country and has been carrying on business in this country, is dissolved in the foreign country it is dissolved in this country : *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (2), per Scrutton L.J. Before the Companies Act, 1928, such a company could not be wound up, unless the dissolution could be impeached on the ground of fraud : *In re Pinto Silver Mining Co.* (3) Now it may be wound up under s. 338 of the Companies Act, 1929 ; but a winding-up order cannot proprio vigore revive a dissolved company. This can only be done by avoiding the dissolution under s. 294 or s. 295 and restoring the company to the register ; in which case the order would only be made upon terms and without prejudice to rights acquired before the order was made : *Morris* v. *Harris*. (4)

On the dissolution of the Russian and English Bank in

(1) (1881) 17 Ch. D. 600.
(2) [1923] 2 K. B. 682, 691.
(3) (1878) 8 Ch. D. 273.
(4) [1927] A. C. 252.

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January, 1918, such rights and property as it then possessed vested in the Crown as bona vacantia: See s. 296; *In re Higginson and Dean* (1); *In re Sir Thomas Spencer Wells.* (2) Can it be suggested that a mere winding-up order has the effect not only of recalling a defunct company to life but of revesting it with property which for eighteen years has belonged to another owner?

Nov. 11. *Lionel Cohen K.C.* replied. According to the argument for the respondents a company, which after dissolution has been ordered to be wound up, has, notwithstanding the order, no name, no assets and no creditors; and there is nothing for the order to operate upon. This cannot have been the intention of the Legislature.

The House took time for consideration.

1936. March 12. Lord Blanesburgh. My Lords, the Russian and English Bank, in whose name as principal party this appeal is brought—I will refer to it as the Bank—was incorporated in Russia under Russian law in April, 1910, and with its head office at Petrograd carried on for some years the business of banking on a large scale. In December, 1915, it opened a Branch in London, observing then all the requirements of s. 274 of the Companies (Consolidation) Act, 1908. The Branch did an extensive business in this country until June, 1920—a date some years after the Russian Revolution and, as now appears, more than two years after the Bank, as a result of decrees of the Soviet Government, had been dissolved or had ceased to exist by Russian law. The date of that event may now, I gather, be taken to have been January 26, 1918.

Following upon transactions of some complication in which the Czarist Government were concerned, but the details of which are not at present material, there were in November, 1917, left in the hands of the respondents, Baring Brothers, for the account as is alleged of the London Branch of the Bank, two sums of 80,000*l.* and 100,000*l.* As the claim of the

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(1) [1899] 1 Q. B. 325.

(2) [1933] Ch. 29.

Bank to have these moneys paid over to it was not recognized by the respondents, the Bank on March 23, 1921, brought an action in the Chancery Division of the High Court of Justice to recover these sums with interest. Pleadings in this, the first action, were duly delivered, but owing mainly, it would seem, to uncertainty in this country as to the actual position of Russian Banks under the decrees of the Soviet Government, proceedings were left in abeyance until June 18, 1931. By that date it had been ascertained that for some considerable time and possibly prior to the commencement of the action the Bank had in fact been dissolved in Russia. The respondents accordingly took out a summons in the first action asking for an order that all further proceedings therein be stayed on the ground that the action had been commenced or at all events was being continued in the name of a plaintiff who was non-existent. An order for costs personally against the solicitors on the record for the Bank was also asked for. At the hearing of the summons on the admission made that the Bank had certainly ceased to exist in Russia prior to its date, Eve J. on January 12, 1932, held that the action was no longer maintainable and that all further proceedings in it must be stayed. He suggested, however, that creditors' claims against the assets of the Bank might still be established, in a winding-up made on a petition presented to the Court under s. 338 of the Companies Act, 1929. On February 9, 1932, a creditors' petition, inspired doubtless by that suggestion of the learned judge, was presented to the Court praying, under the section of the Act referred to, for a winding-up order. On that petition and in the presence of and without objection taken by the Attorney-General, a winding-up order was on March 8, 1932, made by Bennett J., and on July 20 following Mr. Edward Maloney, a chartered accountant, with a committee of inspection, was appointed liquidator for the purpose of the winding-up. The learned judge made the winding-up order under the power conferred upon the Court by s. 338, sub-s. 1 (*d*) (i.), of the Act on evidence adduced that the Bank, an unregistered company, had in Russia been dissolved with its affairs in this country unliquidated.

On December 13, 1933, the liquidator applied to Bennett J. to remove the stay in the first action directed by Eve J. prior to the winding-up order. The application was made on the suggestion that the status of the Bank in an English Court had in relation to any proceedings made necessary by the winding-up been restored. But Bennett J. refused to interfere. Eve J., he said, had made his order because there were no plaintiffs before the Court. From the moment of his order the action was dead for all purposes. Nor had the Bank been reanimated as a result of the winding-up order. Accepting that decision, the liquidator, having duly obtained the leave of the Court and with the authority of the committee of inspection, instructed his solicitors, Messrs. F. M. Guedalla & Co., to issue in the name of the Bank, as plaintiff, the writ in the action out of which this appeal proceeds (to be referred to as the present action). Pleadings have been delivered—the defence of the respondents submitted without prejudice—and it clearly appears that the issues are substantially the same as were those in the first action, the relief claimed being, I think, identical.

In that state of things, on July 18, 1934, the respondents took out in the present action a summons against the Bank and Messrs. Guedalla & Co. asking for an order staying all proceedings therein on the ground that the plaintiff Bank was a dissolved corporation; as before, too, an order upon the solicitors personally to pay the costs of the respondents taxed as between solicitor and client was asked for. On October 9, 1934, Clauson J. made the order in these terms. An appeal to the Court of Appeal was on November 20, 1934, dismissed. This appeal in the name of the Bank, with Messrs. Guedalla & Co. joining as co-appellants in respect of the order made against them for costs, is an appeal from that order of the Court of Appeal.

Clauson J. treated the refusal of Bennett J. to remove the stay in the first action as a decision that the winding-up order did not avoid the dissolution brought about by the foreign law. By that decision he was bound. But he followed it with no reluctance because it commended itself entirely to his own judgment. The non-existent plaintiff could no more sue now than it could before the winding-up order. It had not been reanimated and the dissolution was not avoided. Sect. 191 of the Act did not appear to him to create in the liquidator a new cause of action in the name of the Company which the Company itself could not enforce by action. He did not understand how a liquidator could sue on behalf of a non-existing company. The learned judge suggested that a recourse to the machinery provided by s. 190 of the Act, to which, as to s. 191, reference will presently be made, might provide an escape from the difficulty, and he offered counsel an adjournment to consider that suggestion. But he was not concerned then to decide whether there was any such machinery available. The Lords Justices, Slesser and Roche L.JJ., on appeal, took the same view. The company in such a case as this, Slesser L.J. said, "has no name and there is no company on behalf of which the action can be brought." Both of the Lords Justices, while not finally so deciding, were strongly of opinion that s. 190 provided the remedy for the liquidator if he chose to avail himself of its machinery.

My Lords, I find myself at variance with the learned judges on these matters but I will not give my reasons until I have drawn your Lordships' attention to some sections of the Companies Act, 1929, the statute upon which, of course, everything must depend. Many of its provisions were referred to during the argument. In detail these are too lengthy for citation here. But it may be convenient, if only for purposes of easy reference, that I should now set forth textually the sections of the statute immediately relevant, enclosing in square brackets the provisions which appear in the code for the first time, tentatively in the Companies Act of 1928, and effectively in that of 1929—the consolidating statute which followed in the next Session of Parliament.

The sections or parts of sections taken from Part X. of that Act and immediately relevant are as follows :—

" *Winding-up of Unregistered Companies.*

Sect. 337.—For the purposes of this Part of this Act, the expression ' unregistered company ' shall include any trustee savings bank . . . . and any partnership, whether limited or not, any association and any company with the following exceptions. . . . .

(3.)—A partnership, association or company which consists of less than eight members [and is not a foreign partnership, association or company.] . . . .

338 (1.)—Subject to the provisions of this Part of this Act any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding-up shall apply to an unregistered company, with the following exceptions and additions :— . . . .

(*c*) No unregistered company shall be wound up under this Act voluntarily or subject to supervision.

(*d*) The circumstances in which an unregistered company may be wound up are as follows :

(i.) If the company is dissolved. . . . .

(ii.) If the company is unable to pay its debts ;

(iii.) If the Court is of opinion that it is just and equitable that the company should be wound up. . . . .

[(2.) Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this Part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.]

342.—The provisions of this Part of this Act with respect to unregistered companies shall be in addition to and not in restriction of any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act :

"Provided that an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part of this Act."

The "provisions with respect to winding-up" referred to in s. 338, sub-s. 1, above are contained in Part V. of the Act. I need only here set forth the two sections therein which are immediately under review on this appeal.

"Sect. 190.—[Where a company is being wound up by the Court,] the Court may on the application of the liquidator by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his official name, and thereupon the property to which the order relates shall vest accordingly, and the liquidator may, after giving such indemnity, if any, as the Court may direct, bring or defend in his official name any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

Sect. 191 (1.)—The liquidator in a winding-up by the Court shall have power with the sanction either of the Court or of the Committee of Inspection

(*a*) To bring or defend any action or other legal proceeding in the name and on behalf of the company."

I may recall, my Lords, the fact that the winding-up order in this case was made by reference to s. 338, sub-s. 1 (*d*) (i.), of the Act of 1929 as just cited. It was made because, in the opinion of the learned judge, the Bank was a company "dissolved" within the meaning of the sub-section.

Now it had clearly been the expectation of Eve J. that any winding-up petition in relation to the Bank would be based upon s. 338, sub-s. 2, a sub-section first appearing in the Act of 1928, and by its very terms primarily directed, as it would seem, at those Russian Banks which, like the appellant Bank, having carried on business in Great Britain had been dissolved in Russia without any settlement of their affairs in this country, made or attempted. And Bennett J. was invited by the petitioners to make the winding-up order under that sub-section. But he could not see his way to do so. He preferred to act under the earlier sub-section general in its terms which had been part of the code since 1862, the clause having been held to apply to foreign corporations which had carried on business in this country. The new sub-section although expressed in terms which in other respects exactly fitted the case of the Bank did not extend, in his view, to a company which had ceased to carry on business in Great Britain before the commencement of the Act of 1929. It was confined to a company which had so ceased after that date.

My Lords, I am not prepared, as at present advised, to take so strict a view of the sub-section. I can see no reason, in principle, for a line of demarcation so arbitrary; nor am I forgetful, although its effectiveness was thereby held in reserve, that the sub-section had appeared in the Act of 1928. It must also be remembered in relation to a measure of pure consolidation like the Act of 1929, that normally the date of its commencement is, subject, of course, to any unambiguous direction in any particular instance, the most irrelevant of dates for any effective purpose.

But it is unnecessary further to pursue this topic. The precise effect and purpose of the sub-section may well be the subject of further discussion on some other occasion. But for present purposes it is enough to say that the sub-section, free, in every respect relevant to the present issue, from any ambiguity whatever, remains, whether it be applicable to this Bank or not, a provision of major significance in the determination of this appeal. Its applicability to the Bank is for present purposes relatively unimportant, because to the validity of the winding-up order as actually made no objection is taken by the respondents. They, of course, are strangers to the winding-up and in no way bound by incompetent procedure. But on this application to stay an action which but for the winding-up is admittedly unsustainable they take no objection to the regularity of the liquidation, nor do they question the authority of the learned judge to make the order by which it was constituted.

I mention this specifically because neither in the judgments now under review, nor in the respondents' submissions as presented to this House, have I found it to be either completely recognized or fully faced that the Bank is now in the course of a winding-up under the Act the validity of which in every particular is unchallenged.

It is, however, in full recognition of that fact, and on its basis alone that the question now at issue must be determined: and it may be convenient at once to frame that question in terms of the provisions of the statute itself.

The Bank then, duly in liquidation as a dissolved unregistered foreign company, has under s. 338, sub-s. 1, of the Act become a company to which—irrelevancies excepted—"all the provisions of [the] Act with respect to winding-up . . . . apply." The Bank again is being wound up as an unregistered company. Accordingly, under s. 342, it is to be deemed to be a company under the Act to the extent provided by Part X. of the Act.

And the effect of these two provisions was ascertained as long ago as 1881, when in the case of *Rudow* v. *Great Britain Mutual Life Assurance Society* (1) it was laid down by Sir George Jessel M.R., Baggallay and Lush L.JJ., that to the winding-up of unregistered companies all of the provisions of what is now Part V. of the Act are applicable other than those only which are expressly excepted, while as to the section then standing for s. 342, it was, said Sir George Jessel (2), "plainly the meaning of the Act that all the provisions of Part V. shall apply as much to unregistered companies as to registered companies."

Can it then be effectively denied that under s. 191, sub-s. 1 (*a*), one of the provisions of the Act "with respect to winding-up," the Bank is a company in whose name and on whose behalf its liquidator is thereby empowered with the leave or authority specified to bring or defend any action or other legal proceeding? That, I take it, is the question now to be answered, couched in terms justified by the actual words of the statute. In proceeding to an answer I will, for convenience of statement, refer to the sections of the existing Act of 1929 as if they included the corresponding sections of the repealed Acts which as such have disappeared in the process of consolidation.

And, my Lords, it is noticeable that the precise relation in which the different classes of unregistered companies in course of winding-up under Part X. of the Act stand to s. 191, sub-s. 1, of Part V. is in the present Act less clearly defined than it was in the Consolidation Act of 1908 now superseded.

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(1) 17 Ch. D. 600.

(2) Ibid. 612.

In what was the Part X. of the Act of 1862, s. 203, consolidated in the form of s. 272 in the Part X. (Part VIII. of the Act of 1908), and retained in the code by the Act of 1928, but for some reason omitted from Part X. of the Act of 1929, there was a section which, notwithstanding its similarity to s. 190 of the present Act already set forth, I will transcribe in full in order that the significance of its provisions, set in Part X., when contrasted with the terms of s. 190 set in Part V. may be conveniently appreciated. The section as it remained in the Act of 1908 was as follows :—

"272. If an unregistered company has no power to sue and be sued in a common name or if for any reason it appears expedient the Court may by the winding-up order or by any subsequent order direct that all or any part of the property, real and personal (including things in action) belonging to the company or to trustees on its behalf is to vest in the liquidator by his official name and thereupon the property or the part thereof specified in the order shall vest accordingly; and the liquidator may, after giving such indemnity (if any) as the Court may direct bring or defend in his official name any action or other legal proceeding relating to that property or necessary to be brought or defended for the purpose of effectually winding up the company and recovering its property."

Now the Act of 1928, by which this section was retained in the code, also introduced as a section of general application in a winding-up by the Court what is now found in the Act of 1929 as s. 190. But as has been said the old s. 242 is omitted from Part X. of that Act altogether. Presumably it was supposed that its omission, with s. 190 retained, made no alteration in the result reached. Perhaps that is true. But the result reached is less obvious than it was. For with the old section in its place operative only but expressly in the winding-up of unregistered companies and particularly applicable to such of these as had no power to sue or be sued in a common name, the section achieved two notable ends: (I.) with s. 191, sub-s. 1, already on construction made applicable, it definitely excluded from its scope any unregistered company in liquidation which could not sue or be sued in a common name; (2.) it indicated with no less definiteness that section as providing the means by which an unregistered company in liquidation which could so sue and be sued might "recover its property." It was made to appear by s. 272 that for that purpose in the case of such a company no vesting order was necessary or even appropriate. And this was the position from 1862 to 1929. During all these years there was no s. 190. The fact that effectively since 1929, in the compulsory winding-up of the Bank as in that of any company under the Act, s. 190 may now be utilized has not the effect of making s. 191 less applicable to the Bank than it was. Rather does it appear to me to indicate that if s. 190 in Part V. now applies to the Bank, so also must s. 191, sub-s. 1, in the same Part apply as well. For I am quite unable to understand the view favoured below that the Bank may at one and the same moment for the purposes of s. 190 be a company with property belonging to it or held by trustees on its behalf, while for the purposes of s. 191, sub-s. 1, it is a company without a name; there being "no company on behalf of which the action can be brought," to quote again the words of Slesser L.J. already cited.

But, my Lords, the necessarily close connection between unregistered companies like the Bank and s. 191 if their liquidation is to be effective is perhaps even more clearly disclosed by a comparison between the "dissolution" which under Part X. is a ground for the winding-up of an unregistered company, and the dissolution of a registered company elsewhere provided for in the Act. The contrast is at once arresting and illuminating. In the case of a registered company which has been wound up by the Court it is by s. 221 provided that, "when the affairs of the company have been completely wound up" the Court is to make an order that the company be dissolved: In the case of a voluntary winding-up, it is by s. 236 provided that "as soon as the affairs of the company are fully wound up" the liquidator is to make up an account, convene a meeting of contributories, make to the registrar a report and return as specified in the section, and by sub-s. 3 it is provided that on the expiration of three months from the registration of the return the company shall be deemed to be dissolved.

Now these provisions are as old as the Act of 1862: and so long ago as 1878 in *In re London & Caledonian Marine Insurance Co.* (1), following *In re Pinto Silver Mining Co.* (2), it was held by the Court of Appeal that the Court had no jurisdiction to make an order for winding up a company which had been voluntarily wound up and dissolved under the sections of the Act above stated unless the dissolution could be impeached on the ground of fraud. After dissolution there was no company, as Cotton L.J. observed in the first case.

And to these provisions on this subject no additions were made until the Act of 1880, when the Registrar was given power to strike defunct companies off the Register—a power now found in s. 295. Sect. 294 conferring power on the Court to declare the dissolution of a company to be void did not come until 1907.

These sections which deal, of course, only with companies formed and registered under the Act do not in either case contemplate a new winding-up order; s. 294 apparently contemplates the continuance of the liquidation prematurely stayed by the dissolution declared void; s. 295, apart from the now amplified proviso to sub-s. 5 (as to which see and compare *In re Anglo-American Exploration and Development Co.* (3)), provides by sub-s. 6 for the restoration to the Register of the defunct company. It is, however, interesting to note the form of words used to describe the result achieved in each case. Under s. 294 the proceedings to be taken after an order is made are to be such "as might have been taken if the company had not been dissolved": and by s. 295, sub-s. 6, after a company which had been struck off the register has by order of the Court been restored, it is provided that after the procedure prescribed " the company shall be deemed to have continued in existence as if its name had not been struck off."

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(1) (1878) 11 Ch. D. 140.
(2) 8 Ch. D. 273, 283.
(3) [1898] 1 Ch. 100.

We may find a striking analogue to these provisions in Part X., to which we now proceed. But how striking is the contrast there presented between a " dissolution " as just described from ss. 221 and 236 and the " dissolution " of the unregistered company now envisaged. The first dissolution—a complete bar to a winding-up order—now becomes the occasion for such an order. No longer is there no company, no debts, no property, nothing to wind up. One of the occasions of the order authorized by Part X. is that the company is unable to pay its debts ; another, that it is just and equitable that the company should be wound up : under s. 338, sub-s. 2, the unregistered company there described may be wound up " notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated "—a complete contrast.

My Lords, these extracts to my mind disclose at once the legislative purpose underlying Part X. and the manner in which in relation to so-called dissolved companies that purpose is given effect. Take a company described in sub-s. 2 of s. 338. That company, although in terms stated to be non-existent in the country of its incorporation, is not only a company which may be wound up but, on an order for winding it up made, it is by s. 342 to be deemed to be a company under the Act, not, be it observed, a " dissolved " company under the Act : there is, as Cotton L.J. observed, no such thing. Following Sir George Jessel's terminology it is to be deemed to be a registered company ; adapting the phraseology of the Act already alluded to and equivalent in effect, it is to be treated as if it were a company which had not been dissolved.

It is not denied that it was within the competence of the Legislature so to enact : the only question is whether it has in substance done so. My Lords, I cannot doubt that it has. The Act in regard to these companies is dealing with organizations which, as such, are beyond the control of Parliament.

It is not for the Legislature of this country either to kill or to make them alive. In this vital respect they stand in a totally different position from the companies under the Act whose dissolution the Act has brought about and whose dissolution it may qualify as in s. 205, sub-s. 5, or may, as it has done, declare to have been void. But all that with reference to the dissolution of a foreign corporation the Legislature can effectively say is that it shall be ignored in a winding-up of the Company under its own Act. And it is ignored for the reason that any dissolution without a winding-up previously completed and with creditors unpaid is an offence, an injustice, to these creditors if it be permitted to defeat their claims against the Company. Therefore such a dissolution is to be ignored.

And reading s. 338, sub-s. 2, and 342 together I cannot doubt that in express terms the Legislature has said that the dissolution shall be ignored in that case—creating a situation the full benefit of which can be extended to the liquidation of the Bank as a dissolved foreign corporation : thus rescuing from sterility a winding-up by statute directly authorized.

My Lords, having reached this conclusion I need go no further. It follows from what I have said that in my judgment the Bank—deemed by the statute to be a company under the Act—is a proper plaintiff in the present action. I have had the advantage of reading the judgment which my noble and learned friend Lord Atkin has prepared. I desire to say that I am in entire agreement with the broad grounds on which he bases his conclusion and I concur in the motion allowing the appeal, which will be made in his name. I would only add, by way of a general observation, that any difficulties in this liquidation will, I doubt not, be met as they arise. It will be open to the Court completely to control the liquidator at every step. In the present action the Court will doubtless be vigilant to see that no order possibly affecting either the Attorney-General on behalf of the Crown or the Soviet Government is made without due notice to each, while by an order staying proceedings after the main purpose of the liquidation has been effected the Bank under s. 342 will cease even to be deemed a company under the Act.

LORD ATKIN (read by LORD ALNESS). My Lords, the question is whether the liquidator appointed after the appellant Bank had been ordered to be wound up may use the name of the Bank to sue to recover an alleged debt of 180,000*l.* said to be due from the defendants. The alleged debt is said to have arisen in respect of purchases made for the former Russian Government during the war and paid for by the Bank. The Russian Government is said to have reimbursed the Bank by orders upon the defendants, who held an account for the Government in London. The present Russian Government makes no claim to the money. It is said, however, by the defendants, that the Bank was a Russian corporation which was dissolved by Russian law in or about 1918, and therefore it cannot sue. Apart from the provisions of the Companies Act and the existence of a winding-up order there can be no doubt that this contention would prevail. The question is whether those factors alter the position. The appellant Bank is one of several similar institutions incorporated in Russia and carrying on business by a branch or branches in this country. Their legal position has been the subject of much litigation. They all seem to have carried on business in this country for some considerable period after the Russian Revolution; and for a time it was in doubt whether the effect of the new legislation was to dissolve the corporation altogether, or merely to deprive it of its property, leaving the juristic person in existence. After decisions either way depending upon the varying evidence of fact as to the effect of the Russian laws, it was eventually determined apparently beyond further dispute in or about 1931 that the corporations were in fact dissolved in Russia. The material date is said to be some time in the year 1918. The resulting position was embarrassing. There were what appeared to be assets in this country, some doubtless acquired during the period of trading by the nonentity; there were creditors of the pre-dissolution and post-dissolution period. The obvious course was to wind up the companies, if that could be done. By the Companies Act of 1862, s. 199, there was power to wind up unregistered companies "whenever the company is

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dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs." Under this provision it was accepted law that the Courts could order a winding-up of a company incorporated abroad which had carried on business in this country. But there had been no decision as to the power to wind up an incorporated company which had in fact been dissolved although there may have been a very occasional order made in such cases without any direct notice of the point. It was in these circumstances, and I have no doubt with direct reference to the difficulties as to the Russian banks disclosed by the litigation to which I have referred, that the Legislature in the Companies Act of 1928, an amending Act, s. 91, provided " Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain it may be wound up as an unregistered company . . . . notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated." The section is now found in the Companies Act of 1929, the consolidation Act, in Part X. entitled " Winding up of unregistered companies" as sub-s. 2 of s. 338, which by sub-s. 1 enacts " Subject to the provisions of this Part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company." . . . . Sub-s. 1 (*d*), repeating the provisions of the Act of 1862, s. 199, and the similar s. 268 of the Act of 1908, provides " The circumstances in which an unregistered company may be wound up are as follows " ; if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs. I for myself come to the conclusion that s. 91 of the Act of 1928 was introduced as s. 338, sub-s. 2, into the Act of 1929 for the removing of doubts and to make it clear that the words " if the company is dissolved " were meant to apply to an incorporated company dissolved according to the law of its constitution, and not intended to give a new enabling power only applicable to a company which should cease to carry on business after the passing of the Act. Such a construction would in fact in reference to the Russian Banks have defeated the immediate object of the Legislature.

What then is the effect of a winding-up order made in pursuance of s. 338 on a foreign incorporated company which has been dissolved and ceased to exist under the laws of its own country? It is said by the respondents (and the view has found favour in the Courts below) that the company having at one time ceased to exist continues non-existent; that there are no words in the Act which bring it back to life, and that though you order the company to be wound up there is in fact no company in existence, and the winding-up, whatever it means, must proceed on that footing. Now the effect of a winding-up of a company under Part V. of the Act, containing provisions which, it has been noted, expressly apply to the winding-up of an unregistered company, is that a liquidator is appointed whose duty it is to take possession of the assets of the company, ascertain the debts in accordance with the provisions as to proof of debts contained in Part V. (v.) of the Act, and discharge the debts so far as the assets permit. But on the respondents' assumption three results emerge: (1.) There is no company to be wound up. (2.) There are no assets of the company. (3.) There are no debts of the company.

1. I need say little about the existence of the company. It seems to me that all the provisions of the Companies Act relating to winding-up assume that there is a company in existence. The process of winding-up is one of operating upon an existing thing so as to dispose of its assets and obligations and eventually bring it to an end. The powers given to the liquidator under s. 191 seem to have no meaning except upon the footing that a company is in existence. One may note for instance s. 191, sub-s. 2 (*d*), power to draw, accept, etc., any bill of exchange in the name and on behalf of the company " with the same effect with respect to the liability of the company as if the bill or note had been drawn accepted," etc., " by or on behalf of the company in the

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course of its business." It is the company which is being wound up, not the affairs of the company; e.g., s. 191, sub-s. 2: "The liquidator in a winding-up by the Court" of the Company has express power (*h*) to do all things necessary "for winding-up the affairs of the company and distributing the assets."

2. Every section of the Act which deals with property in a winding-up treats and describes the property as property of the company. I need only refer to s. 189 and s. 191, sub-s. 2 (*a*). As is well known the scheme of a winding-up is that no property is vested in the liquidator unless a special order is made under s. 190, to which I will refer later. The liquidator deals with the company's property in right of the company or usually in the name of the company, possessing the powers of the directors and the special statutory powers given to him by the Act. On the assumption adopted by the judgments under appeal not only is there no property of the company in existence, with the result that none of the statutory powers of the liquidator in respect of property come into existence, but there is the further difficulty that all that which had been the movable property of the company has become vested in the Crown as bona vacantia.

For some reason which I cannot appreciate some of the learned judges in the Courts below seem to have thought that this obvious difficulty might be cured by obtaining a vesting order under s. 190. But when that section is looked at the power of the Court is found to be to "direct that all or any part of the property of whatsoever description belonging to the company . . . . shall vest in the liquidator by his official name." The initial futility remains. 1. There is no property belonging to the company. 2. What has been the property of the company now belongs to a third person, the Crown, and there is no power to vest the property of a third person in the liquidator. The result is that if the company for the purposes of winding-up is to be treated as dissolved there never can be any assets over which the liquidator can exercise any powers of any kind. On the assumption I prefer to adopt the Crown acquired a defeasible title defeated upon the making of a winding-up order. 3. The same reasoning applies to debts, affecting the provisions in s. 264 as to preferential payments of certain debts such as rates, taxes, wages of clerks or servants, workmen and labourers, amounts due for workmen's compensation and the like. It is I think clearly established that if the debtor becomes non-existent the debt is at an end. It is unfortunate that this aspect of the case does not seem to have been brought to the attention of the Courts below, for they would have found that their attempted solution by means of a vesting order would have left the liquidator still stranded; for there would be no debtors amongst whom to distribute the supposed vested assets. "The debts of a corporation either to or from it are totally extinguished by its dissolution: so that the members thereof cannot recover or be charged with them in their natural capacities: agreeable to that maxim of the civil law: 'Si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent,'" cited from 1. Bl. Com., p. 484, by R. S. Wright J. in *In re Higginson & Dean*. (1) I do not share the doubts of the learned judge in that case that Blackstone's proposition may mean no more than that the individual corporators are no longer liable. The principle is stated absolutely; and clearly if the corporators are not liable there is no one else who could be liable.

What is the result? The Legislature has provided that a dissolved foreign corporation may be wound up in accordance with the provisions of the Companies Act. The provisions of the Companies Act as to winding-up are only applicable to corporations which are in existence. Are we to say that the legislative enactment is completely futile: or is there another solution? My Lords, I think that we are entitled to imply, indeed I think it is a necessary implication, that the dissolved foreign company is to be wound up as though it had not been dissolved, and therefore continued in existence. This seems to me with respect the necessary result of saying that it shall be wound up in accordance with the provisions of the Act.

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(1) [1899] 1 Q. B. 325, 330.

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There is nothing abnormal in such a provision. The municipal law of this country, as of other countries, accepts the principle of international law that countries ordinarily accept the existence of juristic persons brought into being or recognized as existing in their country of origin. Similarly they accept the destruction or cessation of such a juristic personality under the law of its country of origin. But if the municipal law choose it may in defined conditions refuse to accept or may accept only under conditions either the creation or destruction of a foreign juristic person: whether it has done so is for the municipal Courts to decide, but if it has, then the municipal Court must accept the situation. I see nothing incongruous in the Legislature saying in effect, we accept the existence of a foreign corporation coming to trade in this country; we shall only impose a condition of registration. But if the corporation does trade here, acquires assets here and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable it may be wound up here so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purpose of the winding-up it shall be deemed not to have been dissolved; for that event would defeat our municipal provisions for winding up a corporation. This does not appear to me to be recreating or reconstituting a new corporation; it is for particular and limited purposes refusing to recognize the dissolution of the old. The analogy is to the provision of s. 295, sub-s. 6, which provides that where a defunct company has been struck off the register by the Registrar, and after publication of that fact in the Gazette has been dissolved, the Court may restore the company's name to the register at any time within twenty years "and the company shall be deemed to have continued in existence as if its name had not been struck off."

With great respect to those who think otherwise I cannot think that it is a preferable solution to suppose that the company is still non-existent but that the winding-up is of the affairs of the Company and that the liquidator of the affairs of the company is to have recourse to what would have been the assets of the corporation if it had not been dissolved, and to distribute them amongst those who would have been creditors in the same circumstances. Nor is it any easier to confine the distribution to assets existing at the date of the dissolution amongst creditors in existence at the same date. The latter proposal, indeed, seems to accentuate difficulties in the case of a bank trading after dissolution and daily changing its assets and liabilities. What happens to interest accruing after dissolution? But to neither view do I find it possible to apply the terms of the statutory duties of a liquidator. I suggest that you cannot distribute the value of non-existent rights amongst the owners of non-existent obligations: and that you must subsume for the rights and obligations a juristic person who possesses the one and is subject to the other.

It is unnecessary to discuss the terms of the Companies Act dealing with unregistered companies other than corporations, including certain partnerships: it is obvious that the word "dissolution" in connection with them has quite a different connotation. Rights and obligations still remain attributable to continuing juristic persons, and none of the present difficulties exist.

Every one must be conscious that the interpretation of s. 338 as applied to foreign dissolved corporations presents difficulties; and one may wish that the Legislature had worked out the solution itself. But the construction which I have felt bound to adopt seems to provide the only means for securing an effective winding-up; and also a principle upon which future problems in the course of liquidation may eventually be solved. I might add that if the company continues to exist for the purpose of winding-up I find no difficulty in holding that such assumption is valid for the purpose of validating as a creditor of the company a person who on that assumption presents the petition for the purpose of winding-up.

In the result it appears to me that the order for winding-up having been validly made, the order under s. 191 permitting the liquidator to bring this action in the name and on behalf of the company was rightly made, and the action so brought was properly constituted. I am of opinion that this appeal should be allowed: that the order of Clauson J. dated October 9, 1934, and the order of the Court of Appeal dated November 20, 1934, should be set aside: and that the defendants should pay the costs here and in the Courts below.

Lord Russell of Killowen. My Lords, the exact point which we have to determine may, I think, be stated thus: Does the Companies Act, 1929, enact that if an order is made under s. 338 for the winding-up of a foreign corporation which has been dissolved (and has therefore ceased to exist), according to the law of the country of its creation, that corporation may sue as plaintiff in an action instituted in the Courts here? Does the Act provide that the corporation may sue notwithstanding that it has ceased to exist, or that the corporation shall spring into existence once more, or (what is in effect the same thing) that it shall be deemed to be in existence?

The dissolution of a corporation, when that corporation is a company registered under the Act, and its restoration to life, are matters which are dealt with in sections specifically framed for that purpose. Thus ss. 221, 236 and 245 provide for the dissolution of such a company on the completion of a winding-up by the Court, a member's voluntary winding-up, and a creditor's voluntary winding-up respectively: and s. 295 empowers the Registrar of Companies under certain conditions to take certain steps which include the striking the name of the company concerned off the Register, and which result in the company's dissolution. The Legislature, however, recognizes on the one hand that cases may arise where the dissolution of the company may operate prejudicially to others, and on the other hand that it is impossible to work justice without re-creating the existence of the dissolved corporation. Sect. 294 accordingly gives a power to the Court, within a limited period, to make an order—I quote the words of the section—"upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved." Sect. 295, sub-s. 6, gives a power to the Court, within a limited period, to order the name of the company to be restored to the Register and the sub-section provides that "upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off." Finally s. 296 provides that where a company is dissolved its property shall, subject and without prejudice to any order which may at any time be made by the Court under ss. 294 and 295, be deemed to be bona vacantia.

My Lords, I refer to these sections for the purpose of showing that the Legislature was fully alive to the necessity of bringing into existence once more a dissolved corporation, before any rights could be asserted by or against it, and had in express terms made specific provision for that purpose by giving the Court power (in the one case) to declare the dissolution to have been void, and (in the other case) to restore the name to the register with the result that the company's existence is deemed to have continued throughout; but always with power to insert special provisions in the order, for the purpose of meeting the requirements of each particular case.

The importance of these considerations lies in the fact that the appellants contend that this Act also provides for the bringing into existence once more of the dissolved foreign corporation which is ordered to be wound up under s. 338, or for its possessing and enforcing rights notwithstanding its dissolution. There is admittedly no provision in the Act which in express words purports to do this. The argument is that in the case of a dissolved foreign corporation such a provision is to be implied. In order, however, to justify us in holding that any such legislation by implication has taken place, two conditions must, I conceive, be fulfilled: the provision to be implied must be a provision whose existence is necessary in order to give effective operation to what has been

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expressly enacted; and the provision to be implied must be capable of clear and certain definition.

I now turn to a consideration of s. 338. It is to be observed in the first place that it is a section which deals with all unregistered companies as defined in the Act. It includes, therefore, countless cases of partnerships, associations and companies which are merely names for groups of individuals, and which are not corporations at all. The case of a foreign corporation incorporated by foreign law, though covered by the language used, is not referred to in terms in sub-s. 1. It is referred to expressly in the second sub-section, a provision which appeared in company legislation for the first time in 1928. The section, therefore, applies to a vast number of cases in which no question can arise as to cesser of the existence of the unregistered company; in which, in other words, the dissolution referred to in sub-s. 1 does not involve the extinction of rights and liabilities, all of which continue vested in and binding upon the individuals composing the unregistered company. Part X., in short, is dealing with unregistered companies, and only incidentally with corporations which have been dissolved. It is essential to bear this in mind when examining the provision from which the alleged implied legislation is said to flow. This provision consists of the words in sub-s. 1: "and all the provisions of this Act with respect to winding-up shall apply to an unregistered company." Let me state the argument. The Act says that all the provisions of Part V. shall apply; therefore s. 191, which is one of those provisions, applies; but s. 191 includes a power to the liquidator of a company registered under the Act to bring an action in the name of the company; therefore the liquidator can bring an action in the name of the unregistered company; therefore the Act has enacted that the dissolved foreign corporation can sue as plaintiff.

If the words which I have quoted above have this effect one is entitled to know how the matter stands. Has the statute enacted that a non-existent person may nevertheless sue as a plaintiff, be a party to litigation, and perhaps recover judgment or be ordered to pay costs? Or has the statute enacted that the corporation shall be restored to life, and if so is it restored to life as a corporation constituted by Russian law or by English law, and who are the corporators; and is it resuscitated only as from the date of the winding-up order, or retrospectively as from the moment of its dissolution? These are questions which it seems to me must be capable of being answered from a perusal of other parts of the Act before you can make the required implication. For myself I cannot find the answer anywhere; it certainly cannot be found in the power given to the liquidator to sue in the name of the company, for a general power of that nature, applicable in the great number of cases to unregistered companies which though dissolved in one sense have not ceased to exist, cannot per se amount to an enactment that a non-existent person may sue, or that a non-existent person is to be made to live again, or is to be deemed never to have died. The provision here sought to be implied is incapable of clear and certain definition.

Nor, in my opinion, can the existence of the provision which is sought to be implied be said to be necessary in order to give effective operation to what is expressly enacted. The winding-up of a company is not the same thing as the dissolution of a company. A company is wound up when its affairs are wound up; and its affairs are wound up by getting in such assets as can be got in, and paying therewith such debts as are ascertainable, and disposing of the surplus (if any) to those entitled thereto. The application of s. 338 to the case of a dissolved foreign corporation is no doubt on any view of the present appeal full of difficulties. Many of the provisions contained in Part V. cannot, if read strictly, apply to such a case. Thus, strictly speaking, there could not be a petition presented by a creditor; there are no creditors of a dissolved company. Nor could a list of contributories be settled. Nor are there any assets of a dissolved company. When s. 338 enacts that all the provisions of Part V. shall apply to an unregistered company, it cannot mean that every provision of Part V. shall apply to every unregistered company which is ordered to be wound up. For instance, many provisions are incapable of application to the case of a partnership which is an unregistered company within the meaning of Part X. The words must surely be read with some qualification, and I suggest that they simply mean that the provisions of Part V. shall apply so far as capable of application; and even then a somewhat artificial meaning must be given to some of the language used, when it is sought to apply them to the case of the winding-up of a dissolved foreign corporation. Thus "property" and "assets" must refer to what would have been property or assets of the corporation if it had not been dissolved; and so with "creditors" and "debts."

So reading the Act in relation to dissolved foreign corporations I can find no basis to support the suggested implication.

What are the facts of the present case? A Russian corporation owing its existence to Russian law, an English translation of whose name or description appears to be "Russian and English Bank," was dissolved and ceased to exist seventeen years ago. The property which it owned in this country thereupon became the property of the Crown. After the lapse of some fourteen or fifteen years an order is made under s. 338. Upon the happening of that event, it is alleged, the Act, which contains express and carefully framed provisions for resuscitating dissolved companies which were registered under the Act, enacts, without any express words at all but merely by implication, that dissolved foreign corporations are to arise from the grave in full life and vigour, and entitled to sue to recover property which for fourteen or fifteen years has been the property of the Crown; or that they are to be so entitled notwithstanding that they do not exist.

My Lords, I confess frankly that I find myself unequal to the task of assenting to this view. It appears to me to be legislation pure and simple. It may well be that had the difficulties incident to the winding-up of dissolved foreign corporations been considered in greater detail, express provisions could have been inserted for the purpose of dealing with those difficulties. That, however, is supplementary matter for the Legislature, not for us, to provide. Upon the construction of the Act as it is framed, I find myself in agreement with the views expressed by Bennett and Clauson JJ. and Slesser and Roche L.JJ.—namely, that the plaintiff in the present action remains, notwithstanding the winding-up order, a non-existent person and cannot sue. The defendants are in effect being sued by an English translation of the name of a dissolved Russian corporation—a nominis umbra indeed.

Sect. 190, if read in relation to dissolved foreign corporations in the artificial light indicated above, may with the assent of the Crown provide a means by which the liquidator can obtain relief, but it would then be by means of an action in which he personally would be the plaintiff. I express, however, no concluded opinion as to this, neither do I care to express a concluded opinion upon the question whether sub-s. 2 of s. 338 would have been applicable to this corporation. My present opinion is in favour of the view that the sub-section would have applied.

For the reasons which I have indicated I would dismiss this appeal.

LORD MACMILLAN. My Lords, the Russian and English Bank, a company incorporated in Russia which had carried on business in Great Britain, was dissolved under Russian law (as was agreed for the purposes of this case) in December, 1918, and thereupon ceased to exist. On March 8, 1932, Bennett J., on the petition of three persons claiming to be creditors, made an order for the compulsory winding-up of the Bank under the provisions of the Companies Act, 1929. The order was made after hearing the Attorney-General, who appeared in the proceedings on behalf of His Majesty to assist the Court and received an award of costs out of the assets. The validity of this order is not in question. It was made in pursuance of the powers conferred by s. 338, sub-s. 1, of the Companies Act, 1929, which authorizes the compulsory winding-up of an unregistered company in certain enumerated circumstances, of which the first is "if the company is dissolved." The Russian and English Bank complied with these requirements; it was an unregistered company within the statutory meaning and it had been dissolved.

By the winding-up order one of the official receivers was appointed provisional liquidator, and on his application an order was made by the Registrar on July 20, 1932, appointing a chartered accountant to be liquidator of the company and certain persons, described respectively as creditors and contributories of the company, to be a committee of inspection. It appears from the Registrar's order that he had before him two reports by the official receiver of the results of meetings of creditors and contributories of the company, both dated June 27, 1932.

On December 20, 1932, the Registrar, on the application of the liquidator, made an order that the liquidator should be at liberty to commence and prosecute an action in the Chancery Division in the name of the Russian and English Bank against the present respondents and His Majesty's Attorney-General for certain relief as set out in the order. On June 6, 1933, a writ was accordingly issued at the instance of the Russian and English Bank against the present respondents. The effective claim in the action is for recovery of two large sums of money held by the respondents and alleged to belong to the Company.

The respondents thereupon took out a summons in which they made application "that all further proceedings in this action may be stayed on the ground that the plaintiff Bank is a dissolved corporation." On the matter coming before Clauson J. this application was granted and the solicitor by whom the writ had been issued was ordered to pay the costs of the respondents. The Court of Appeal (Slesser and Roche L.JJ.) affirmed the decision of Clauson J. The ground of judgment in both Courts, put shortly, was that a non-existent plaintiff could not sue.

My Lords, I am of opinion that the objection which has been taken to the title to sue of the Russian and English Bank and which has been sustained by the Courts below is not well founded. The Legislature has expressly enacted in s. 338 of the Companies Act, 1929, that a dissolved, that is to say, a non-existent, company may be the subject of a compulsory winding-up order. In addition to sub-s. 1 (*d*) of s. 338 under which the present winding-up order was made, I may refer to sub-s. 2, which enacts that "where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this Part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated." Bennett J. took the view that this sub-section was inapplicable to the present case because the Russian and English Bank had ceased to carry on business in Great Britain before the Act of 1929 came into operation. Be that as it may, it is manifest that the Legislature has not been deterred by the fact that a company has ceased to exist from authorizing it to be wound up.

Now the purpose of pronouncing a winding-up order is to secure the collection and distribution of the assets of the company to which it relates. The logical inquirer may ask how a company which has ceased to exist can have any assets. But when the Legislature authorized the making of a winding-up order in the case of a dissolved company it must be presumed to have intended such order to be effective and to result in the collection and distribution of assets. To hold that the Legislature has authorized the collection of the assets of a dissolved company, but has withheld the power of recovering these assets, would be to attribute a singular ineptitude to Parliament. It is necessary therefore to see what powers have been conferred in the matter.

The opening words of s. 338 are quite definite. After authorizing the winding-up of an unregistered company (which includes a dissolved unregistered company) the section enacts that "all the provisions of this Act with respect to winding-up shall apply to an unregistered company" with certain exceptions which for the present purpose are immaterial. Turning to the Part of the Act relating to winding-up I find in s. 191 that "the liquidator in a winding-up by the Court shall have power with the sanction either of the Court or of the committee of inspection (*a*) to bring or defend any action or other legal proceeding in the name and on behalf of the company." The matter is not left to implication. Here is direct legislative warrant for what has been done in the present case. I am at a loss to understand how it can be said that in order to reach the conclusion that the present action has been competently brought at the instance of the Russian and English Bank I must commit the indiscretion of quitting the judicial sphere and trespassing on the legislative domain. To me it seems clear that the Legislature has in terms authorized this very procedure.

Recognizing that the Legislature must have meant the process of liquidating a dissolved company to have some practical effect, the learned judges below have suggested that it may be possible to utilize s. 190, though not s. 191. But why should s. 190 be held to be available and s. 191 not? Sect. 190 presents a difficulty different from, but just as embarrassing to the purist as s. 191, for it authorizes the pronouncement of an order vesting in the liquidator all or any part of the property belonging to a company which is being wound up. As I have already pointed out, a company which is non-existent cannot have any property. If, as is suggested, the Legislature has authorized the making of an order vesting non-existent property in the liquidator, it does not seem to me more extravagant that it should have permitted a non-existent company to sue. A legal system which for so long admitted as suitors in its courts those wholly fictitious persons John Doe and Richard Roe, who were in much worse case than the Russian and English Bank, for they never existed at all (1), might be expected to suffer with equanimity the apparition, at the bidding of the Legislature, of a dissolved company as a plaintiff.

The truth is that the whole procedure is highly artificial. Once it is conceded, as it must be, that a non-existent company may be the subject of a winding-up order it is inevitable that anomalous consequences must ensue, some of which may not have been foreseen by the Legislature. The procedural difficulties in the way of adapting the normal winding-up machinery to the abnormal case of companies already dissolved are undoubtedly formidable, but I venture to think that they are more logical than real. Thus it has apparently not proved impracticable to hold meetings of creditors and contributories of this dissolved company, for, as I have mentioned above, the official receiver reported that such meetings had been held. At any rate these difficulties must be faced and surmounted as best they may be, for the Legislature has enacted that dissolved companies may be wound up. The present difficulty, if it be one, is only one of many, and to my mind is less formidable than others which must be encountered if the legislation is to be effective. It is after all only a matter of mechanism, and I do not think that it is either necessary or profitable to discuss problems as to the precise legal status of a dissolved company which has been ordered to be wound up. In this connection metaphors may easily be misleading and serve only to create their own puzzles.

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(1) The ancestor of John Doe at any rate existed as a real person: See Blackstone, Comm., 10th Ed. (1787), Vol. 3, ch. xi., pp. 201, 203.—Note by Reporter.

Reference has been made to ss. 294 to 296 of the Act, which (inter alia) provide the means for declaring the dissolution of a company to be void and for restoring dissolved companies to the Register. These sections, however, relate only to companies registered in this country and do not throw light on the present question. The provisions of s. 296 as to the property of a dissolved company becoming bona vacantia are, in my view, inapplicable to the Russian and English Bank. But if the assets of the Bank on its dissolution became bona vacantia, either at common law or by statute, the Attorney-General on behalf of the Crown was present when the winding-up order was pronounced and in acquiescing in that order he must be taken to have had in view all its consequences, including the consequence that it would involve the effective collection and distribution of the assets which belonged to the company.

I accordingly concur in the motion that this appeal be allowed, the orders of the Court of Appeal and Clauson J. be reversed, the stay of proceedings be recalled and the action be allowed to proceed at the instance of the Russian and English Bank.

Lord Maugham (read by Lord Russell of Killowen). My Lords, the single question on this appeal is whether the Courts below were right in staying all further proceedings in the action on the ground that the apparent plaintiff, the Russian and English Bank, is a dissolved corporation and therefore not a legal persona capable of suing. It is not in dispute that the Russian and English Bank was incorporated in the year 1910 in Petrograd under Russian law, that in 1915 a branch of the Bank was established in London and further that that corporation was dissolved as the result of Russian legislation in or about the year 1918 and thereupon ceased to be a legal entity. I do not think it can be doubted that the dictum of Scrutton L.J. in *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (1) is correct. He stated that: " If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person." Accordingly an action in the name of the Bank against the present appellants started in 1921 was properly stayed by Eve J. on that ground. It is, however, asserted that the whole position was changed when on March 8, 1932, an order was made by Bennett J. for the winding-up of the company and the appointment of a liquidator; for it was contended, as I understood the argument, that the words " Russian and English Bank " in the title to the action now properly describe a corporation which is entitled to sue in this country—a result which is ascribed to the effect of a winding-up order made pursuant to the provisions of s. 338, sub-s. 1 (*d*), of the Companies Act, 1929. There appears, however, to be an alternative view held by at least one of your Lordships that the words in the title do not indicate a real corporation at all, but a nominis umbra—as much a fiction as our old friends

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(1) [1923] 2 K. B. 682, 691.

John Doe and Richard Roe who were abolished by the Common Law Procedure Act, 1852.

There is in my opinion no doubt as to the power of the Court to wind up a foreign company although it has been dissolved in its country of origin. Such a company is an "unregistered company" within the meaning of s. 337, and one of the circumstances in which such a company may be wound up is that it "is dissolved." It follows as a necessary consequence that the dissolved company may properly be described in the petition to wind up by the name which it originally bore, and that a person who was a creditor of the company at the time of its dissolution is entitled to present the petition. No doubt these are curious consequences of the section, and one might wish that the difficulties had been further considered and had been met by express provisions; but the consequences are in my view entirely necessary if the section is to have, as regards a dissolved company, any meaning at all.

The serious and important question remains, Can the company though dissolved sue in its own name? The appellants' contention that it can is based on the combined effect of s. 338, sub-s. 1, and s. 191 of the Act. It is said that the former section makes the latter section applicable to an unregistered company and accordingly that the liquidator has power with the sanction of the Court (which has been obtained) "to bring or defend any action or other legal proceeding in the name and on behalf of the company."

My Lords, but for the opinions some of your Lordships have expressed, I should have had no hesitation in agreeing with the judgments of Clauson J. and of Slesser and Roche L.JJ. on this question. A power "to bring or defend an action" in the name of the company is I think only a power conferred in respect of a company which is in juridical existence. For instance, s. 191, sub-s. 1 (*a*), does not in my opinion authorize a liquidator to use the names of a number of partners in a foreign partnership either for the purposes of offence or defence although this "association" is an unregistered company within s. 337. Nor is there any ground, still less any authority, for thinking that an English company registered under the Act, but dissolved pursuant to s. 294 or s. 295, can sue after a winding-up order unless the dissolution has been declared void under s. 294 or an order has been made restoring the company to the register with the result that it is " deemed to have continued in existence as if its name had not been struck off " (s. 295). The general provision in s. 338 that " all the provisions of this Act with respect to winding-up shall apply to an unregistered company," with certain exceptions, cannot properly be held to mean that every provision of Part V. of the Act is applicable to every unregistered company. This is plain from the consideration that many of the provisions are wholly inapplicable to foreign partnerships or associations ; and scarcely any of the important provisions as regards contributories can be made to apply to a company with foreign statutes, having its existence by foreign law so that the law of the contract between the contributory and the company must be a foreign law.

My Lords, the Russian and English Bank certainly did not exist as a legal entity for some fourteen years after its dissolution. If there is now a legal entity bearing that name it must be a different corporation existing by English law, domiciled in this country, possessing assets, if any, only within the British jurisdiction, and apparently it must be a quasi-trading corporation without statutes, or charter or articles of association and without any corporators, unless in some way it may be held that such shareholders, if any, in the original company as may be domiciled in this country, are in some sense corporators of the new corporation. Russian corporators have plainly had their rights and liabilities extinguished. This new company, if it exists, is not, in my opinion, " the company " pointed to by the language of s. 191, sub-s. 1 (*a*). If indeed the original foreign corporation could be the subject of an order declaring " the dissolution to have been void " (as under s. 294) I could understand the contention of the appellants ; but I do not understand it to be suggested that a winding-up order here can destroy the effect of legal acts in Russia. That would seem to be contrary to all the principles of international law; and the ingenious suggestion that s. 338 may authorize the winding-up of a dissolved company "as if it had not been dissolved" is open in my opinion to the same objection. It has been de facto legally dissolved, and the phrase if analysed must mean that a new corporation is to spring into existence upon the making of the winding-up order.

It is said that the conclusion at which the Courts below have arrived renders it impossible effectively to wind up a foreign dissolved company. I do not agree. Winding-up is a business term denoting the realization of such assets as can be collected and the distribution of the proceeds amongst its creditors. The term was derived from suits for the analogous purposes of winding-up a partnership: see Palmer's Company Precedents, 14th ed., Part II., p. 1. Many companies, if not the great majority, are wound up without any action being brought in the name of the company, for the liquidator has no difficulty in obtaining possession of the assets. Moreover, though the question does not arise for decision, I am by no means satisfied that a vesting order might not properly be made under the provisions of s. 190, reading that section in the same way as s. 338, sub-s. 1 (*d*), must be read in relation to a dissolved company. The peculiar difficulty which would arise from the use of the name of the dissolved company in an action outside the domestic forum would not apply to a vesting order under s. 190 since that section does not contemplate a proceeding by a dissolved company. However that may be, I cannot think that the fact, if it be a fact, that the liquidator may have considerable difficulty in getting in assets which belonged to the company at the date of dissolution, justifies the view that the section impliedly authorizes the creation of a new corporate body.

As regards the alternative view that the liquidator of a dissolved foreign company may commence and prosecute an action in its name though it is non-existent, I will only say that in my opinion the words of s. 338 do not justify so remarkable a novelty as an action without a plaintiff, nor one so unfair to the defendant and so difficult to reconcile with the Rules of the Supreme Court. The practice in the old ejectment action, though it rested upon a string of fictions, was not unfair to the real defendant; for he had the option either of entering into a rule of court to confess the material fictions, or of putting the plaintiff to the proof of his fictions, in which event he would be non-suited. If the action was allowed to proceed and it failed, the lessor of the imaginary plaintiff had to pay the costs, for that was made part of the consent rule. An order for costs against a shadow must needs be a somewhat insubstantial consolation to the successful defendant, even if there be given the usual security for costs.

One other point should be mentioned. It would seem clear that upon the dissolution of the Company according to Russian law its chattels in this country, in the absence of any claim to them by the Russian Government, belonged to the Crown as bona vacantia: see *In re Higginson and Dean.* (1) Under s. 296 (a new section which first appeared in the Act of 1928) the same result would follow, but subject and without prejudice to any order under s. 294 or s. 295. Neither of those sections could be invoked in the present case, and it would seem that unless the Crown waives its claim to the assets in question (as in the case of *In re Hendersons' Nigel Co.* (2)) there will be no assets available for distribution. In the absence of the Crown I do not wish to be taken as expressing a final opinion on this question, but it seems to me to suggest a further difficulty in the way of the nominal plaintiff.

My Lords, for the above reasons I am in favour of dismissing the appeal.

Order appealed from reversed: Ordered that the stay of proceedings be recalled and that the action be allowed to proceed, and that the respondents do pay to the appellants their costs in the Court of Appeal and in this House.

Lords' Journals, March 12, 1936.

Solicitors for appellants: *F. M. Guedalla & Co.*

Solicitors for respondents: *Bischoff, Coxe, Bischoff & Thompson.*

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(1) [1899] 1 Q. B. 325.

(2) (1911) 105 L. T. 370.

[PRIVY COUNCIL.]

RENOUF . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR JERSEY . RESPONDENT.

J. C.*

1936

April 6.

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Jersey—Appeal to Privy Council in criminal cases—No appeal as of right—Crown's prerogative right to grant special leave to appeal and to entertain appeals—Conviction of manslaughter—Alleged misdirection—Principles applicable to review of criminal proceedings by Privy Council.

There is no appeal as of right to His Majesty in Council from the decision of the Royal Court of Jersey in a criminal case.

There is no trace in any legislation, or in an authoritative work, of any such right of appeal. The Ordinances of Pyne and Napper, 1591, which, in the light of present evidence, must be regarded as having been properly confirmed by Order in Council and registered, and as having become part of the law of Jersey, support the view that there is no appeal as of right in criminal matters.

There is, however, no Order in Council, charter, or other instrument of authority from which it can be inferred that the Crown's prerogative right to grant special leave to appeal, and to allow an appeal, in a criminal case from Jersey has been taken away. That prerogative right still exists.

Dicta of Baron Parke in *In re Ames* (1841) 3 Moo. P. C. 409, p. 412, and of Lord Blackburn in *Esnouf* v. *Attorney-General for Jersey* (1883) 8 App. Cas. 304, p. 307, approved and applied.

The prerogative right of entertaining appeals can only be taken away by express words or the necessary intendment of a statute or other equivalent act of State.

Nadan v. *The King* [1926] A. C. 482, p. 491, and *British Coal Corporation* v. *The King* [1935] A. C. 500, p. 511, referred to.

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* *Present:* LORD HAILSHAM L.C., LORD THANKERTON, LORD MAUGHAM, SIR GEORGE LOWNDES, and SIR SIDNEY ROWLATT.

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The Board treats applications for special leave to appeal in criminal cases and the hearing of criminal appeals so admitted as being on the same footing, and, in the case of misdirection, or in any other case of an alleged failure in the proper trial of a criminal case, will advise His Majesty to intervene only if there is shown to have been such a violation of the principles of justice that grave and substantial injustice has been done.

Principle in *In re Dillet* (1887) 12 App. Cas. 459, and observations of Lord Sumner in *Ibrahim* v. *The King* [1914] A. C. 599, p. 615, applied.

Judgment of the Royal Court of Jersey affirmed.

APPEAL (No. 9 of 1935), by special leave, by Dennis Romain Renouf from his conviction in the Royal Court of Jersey (November 8, 1934) and sentence of twelve months' imprisonment with hard labour, on a charge of the manslaughter of Frederick William Whiting on August 19, 1934. The indictment charged the appellant with having on the Place du Pont à Bascule, St. Helier, driven his motor-car at a dangerous speed and to the danger of the public, and with having by his criminal imprudence, want of skill or negligence collided with Whiting and inflicted injuries upon him which caused his death. The appellant pleaded that he was not guilty, but he was found guilty by the unanimous verdict of the jury and was sentenced as stated above.

The ground of appeal was that the Bailiff misdirected the jury as to the degree of negligence necessary to constitute the offence of manslaughter. It was contended that the Bailiff left the jury under the impression not only that the question of the contributory negligence of the deceased was altogether immaterial, but that the appellant must be convicted unless the evidence established that he had taken all the steps that a skilful and sensible driver could have taken, and that he could only be acquitted if the jury were satisfied that the death of the deceased was due to a pure accident or misadventure, such an accident as no reasonably skilful driver could have avoided.

Before the appeal was heard on its merits the question was argued whether, as contended by the respondent, the decision of the Royal Court of Jersey in a criminal case was final and not open to appeal, even with special leave of His Majesty in Council.

1936. Feb. 27, 28; March 2, 3. *Sir Thomas Inskip A.-G.*, *Kenelm Preedy* and *J. P. Ashworth* for the respondent. The appeal is not competent. The decision of the Royal Court of Jersey in a criminal case is final and not open to question or appeal. The Crown has relinquished its prerogative right to entertain petitions and appeals in criminal matters from Jersey. It relinquished that right long ago; the history of the matter goes back as far as the time of King John. The Channel Islands were the territory of the Dukes of Normandy, and became part of the territory of the Crown when the Dukes of Normandy became sovereigns of this Realm. In the reign of King John the people of the Channel Islands elected to detach themselves from the territories which King John lost in France, and preferred to be subject to the English Crown. In return for that adherence or allegiance King John granted certain charters and privileges to the Islanders which have been confirmed by successive Sovereigns. In later times the rights which were granted included the privilege of having the right to determine criminal cases without the power of anybody to apply to His Majesty in Council for special leave to appeal by way of the exercise by the Crown of its prerogative right.

The Constitutions of King John, of unknown date, are the basis of the Royal Court's jurisdiction. By the Constitutions twelve jurats were sworn to keep the pleas and rights pertaining to the Crown, and " the same twelve, in whatsoever Island, in the absence of the justices, and together with the justices when they shall come to those parts, are to judge touching all cases in the said Island, howsoever arising, except cases that are too difficult, and if [" et si ": but suggested correction—" ut si "=as if] any shall be lawfully convicted as a traitor of having departed from loyalty to the Lord the King or of having laid violent hands upon the ministers of the lord the King in exercising their duty in a lawful manner." From that time, by a series of letters and charters, successive Sovereigns assured to the Islands the rights thus conferred by King John. In the reign of Edw. II. there were certain inquiries by way of a writ of quo warranto (1) to inquire why the Islanders claimed to be so independent, and to have their own form of governing and of administering justice. The Commonalty of the Island replied that " They and their progenitors the Islanders here from a time from which memory runneth not have been used always to have 12 such Jurats of themselves . . . . And the said 12 ought to judge touching all causes, pleas, contempts, trespasses (and) felonies made on neighbours, strangers, and others whomsoever . . . . " A charter of Edw. III. (2) confirmed in general the privileges hitherto enjoyed by the Islanders. It is not submitted that the prerogative of mercy has been relinquished by the Crown: by Order in Council of 10 Henry VII., June 17, 1495, rules are laid down that every person shall have a proper opportunity of appealing to the Crown to exercise the prerogative of mercy. [Reference was also made to the following: The Charter of 4 Elizabeth, June 27, 1562 (3) —which, it was submitted, amounted to a relinquishment of the Royal prerogative; Order in Council of June 22, 1565, at Westminster; Order in Council of May 13, 1572, Reglement Touchant Appels, 1572 (4); Order in Council (Guernsey), October 9, 1580, which, dealing with appeals, stated: " Provided that it shall not be lawfull to appeale in anie cause criminall . . . . "]

An important stage in this history was the Order in Council of February 15, 1590 (5), ordering that an inquiry should be made as to certain matters by Dr. Tertullian Pyne and Robert Napper, and the Commission of 33 Elizabeth to Pyne and Napper. (6) The Ordinances of Pyne and Napper, following

(1) Assize Roll, No. 1160. Public Record Office.

(2) Patent Roll, 15 Edw. III., part 2, *m.* 38. Public Record Office.

(3) Patent Roll, 4 Elizabeth, part 3, *m.* 37. Public Record Office.

(4) Jersey Orders in Council, vol. I., p. 60.

(5) Privy Council, Class 2, No. 18, p. 121. Public Record Office.

(6) Patent Roll (Chancery) Elizabeth. Divers years. Roll 1606, No. 22. Public Record Office.

upon their Commission, and dated April 3, 1591, provided in Ordinance 4 that: " And forasmuch as my Lords of Her Majesty's Privy Council are greatly importuned from time [to time] about many causes in which no definitive sentence has been given which is contrary to the ancient privileges of this Island and contrary to the express Orders thereupon laid down and approved by the said Lords And also about many appeal causes [which have been] well judged and wrongly appealed in And about many sentences given in criminal causes or others in which no appeal lies or ought to be suffered . . . ." It will be submitted for the appellant that these Ordinances of Pyne and Napper have never been registered in the Island, and therefore have no real authority. An Order in Council making the registration of such documents necessary was not made until 1679, whereas the Pyne and Napper Ordinances were long before that time, in 1591. Those Ordinances have never been registered, and therefore it is necessary to call attention to the way in which they have been regarded by the Crown. By Ordinance 38 it was provided: " Saving always to Her Majesty her heirs and successors and every such rights titles and royalties and preeminences whatsoever which Her Majesty has had or can and might or ought to have in this Isle notwithstanding those Orders, laws and Constitutions hereinbefore recited or anything herein contained which might be contrary thereto in any manner."

[Reference was made to Orders in Council of June 12, 1635 (1); November 8, 1661 (2); and April 24, 1668 (3), dealing with certain rights of re-hearing.] There is no question about the right of appeal in civil matters. *Ex parte Aubin* (4) is an illustration of the right of appeal to His Majesty for the exercise of the prerogative of mercy. That matter was also dealt with by Orders in Council of June 23, 1698 (5),

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(1) Jersey Orders in Council, vol. I., p. 456.

(2) Ibid. p. 543.

(3) Ibid. 306.

(4) Jersey Orders in Council, vol. II., p. 181.

(5) Ibid. p. 238.

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and November 30, 1699. (1) [Reference was made to *Le Sbirel* v. *Procureur-Général et Autres.* (2)]

The Jersey Code, which was ratified by Order in Council of March 28, 1771, provided (inter alia) that "There shall be no appeal permitted in any matter contested before the Royal Court, before it has been fully heard, and before definitive sentence has been rendered upon the subject." It is very difficult to discover from this Jersey Code what exactly it was intended to be. It is a most curious and diverse collection of laws, and the various parts follow in no logical order. There appears to be nothing in it about the right of appeal in criminal matters: it was never intended to be an all-embracing statement of the rights, privileges and duties of His Majesty's subjects in the Islands.

The authorities seem to show that there was not a clear line between civil and criminal cases. In 1771 there was a Petition of Inhabitants of Jersey to the Crown (3), clause 8 of which read: "That in all criminal cases the inhabitants have no appeal to His Majesty, which induces the court to accuse the inhabitants of criminal acts for personal transgressions, because in such cases there lies no appeal to the throne." Those who petitioned did not like the law that there was no appeal to His Majesty.

The Order of Committee of Council of June 15, 1773 (4), showed that the Ordinances of Pyne and Napper, which it was suggested were of no effect because they were not registered, were recognized as part of and incorporated in the law of Jersey. There was an Order in Council of July 21, 1789 (5), by which Pipon and Durell, and Hemery and Dumaresq were ordered to prepare a statement of criminal law. It appears from this document that whenever an appeal has reached His Majesty in Council reference is made back to the Royal Court for a statement of the law of Jersey. So far as criminal matters are concerned the law is, as this document shows, not the rather elaborate criminal law of England, but the length of the Bailiff's and the Jurats' foot, according to the customs of the Island of Jersey as they understand them. If this be the real measure of the criminal law, then the decision of the Bailiff and the Jurats as to what is the law is final and conclusive, because if a case were to come before His Majesty in Council the only conclusion that could be reached would be that the law is as stated by the Bailiff and the Jurats. Their interpretation of the customs is final.

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(1) Jersey Orders in Council, vol. II., p. 250.

(2) Ibid. pp. 278, 309.

(3) State Papers. Channel Islands. Correspondence. Vol. 7. Jersey. No. 52. Public Record Office.

(4) Privy Council. Class 2. No. 117, p. 222. Public Record Office.

(5) Jersey Orders in Council, vol. IV., p. 209.

[Reference was made to the First (Jersey) Report of the Royal Commissioners, appointed in 1846 for inquiring into the Criminal Laws of the Channel Islands; to extracts from the Statement of Pipon and Durell, November 30, 1789; to the Act of the States of Jersey (as to Civil Appeals), March 7, 1862 (1); and to the Act of the States of Jersey (Criminal Procedure Act), March 23, 1863. (2)] The Royal Commissioners answered in 1847 (inter alia) that in criminal proceedings the accused party has a right to appeal from the petty to the grand jury, whose verdict is final. With regard to the Criminal Procedure Act, 1863, it has been decided by this Board that a note of the evidence taken by the Bailiff would not be admissible in any proceedings before the Board because it was not a note taken in pursuance of any duty laid upon him: *Baudains* v. *Liquidators of Jersey Banking Co. Ex parte Baudains.* (3) That was a decision in a civil case. The importance of the point in relation to criminal cases is that if there is a power in the Board to advise His Majesty to grant special leave to appeal there is no means by which a note of the evidence can be supplied, except unofficially. The Legislature provides for a duty to take a note where a matter can be taken on appeal to the Privy Council. In other cases there is no provision for the taking of notes: that indicates that there is no appeal in the cases where there is no provision for notes to be taken. There is such a

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(1) Jersey, Recueil des Lois, vol. II., p. 179.

(2) Ibid. p. 201.

(3) (1888) 13 App. Cas. 832, p. 833.

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provision in civil cases: Act of the States of Jersey (Depositions in Civil and Mixed Cases), February 5, 1885. (1)

[After tracing the procedure in criminal cases in Jersey reference was made to the following early authorities: *R.* v. *De La Rocque* (2); *R.* v. *Poingdestre* (3); *R. et Gallie* v. *Poingdestre* (4); *R.* v. *Fiott et Ux* (5); *Messervy* v. *Le Geyt* (6); *Measurier* v. *Neale (Guernsey)* (7); *Esnouf* v. *Esnouf et Bisson* (8); *Ex parte Aubin* (9); *Le Sbirel* v. *Procureur-Général et Autres* (10); *Le Cousteur* v. *Dumaresq* (11); *Richardson* v. *De Carteret* (12); *De Gruchy* v. *Bailli et Procureur-Général* (13); *Ex parte Anthoine* (14); *Ex parte De Carteret* (15); and *Ex parte Procureur-Général et autre.* (16)] In *Esnouf* v. *Esnouf et Bisson* (8) an inquiry was directed whether the matter was so criminal as not to be one which would admit of an appeal: it was one of the most crucial Orders in Council in the whole case. The question was on which side of the line between civil and criminal cases it fell, and whether it was not so criminal as to be a case in which an appeal ought not to be allowed.

In the Report of the Royal Court referred to in the Order in Council of November 22, 1822 (17), it was stated that: "From the sentence of the Court in criminal matters, even if the culprit is condemned to death, there lies no appeal to His Majesty in Council." In Cæsarea, by Lieut. Bailiff Poingdestre, circa 1680, it was said that the Islanders had the power of determining "all causes and matters arising here, independently from any other jurisdiction whatsoever, but from the King onely, assisted by His Most Honble. Privy Council, and in case of appeale onely; which appeale is not admitted in criminal causes . . . ." "Cæsarea" was the Roman name for Jersey. [Reference was also made to Le Geyt, Sur les Lois, Etc., de Jersey, circa 1690–1710, vol. IV., p. 339; and to Falle's Account of the Island of Jersey, 1734 ed., pp. 215–217.]

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(1) (1885) Jersey, Recueil des Lois, vol. IV., p. 107.

(2) (1569) Jersey Orders in Council, vol. I., p. 56.

(3) (1593) Ibid. p. 62.

(4) (1620) Ibid. p. 106.

(5) (1624) Ibid. p. 126.

(6) (1630) Ibid. p. 446.

(7) (1638–9) Privy Council. Class 2, No. 50, p. 106 (Fol. 49). Public Record Office.

(8) (1662) Jersey Orders in Council, vol. I., p. 206.

(9) (1689–90) Jersey Orders in Council, vol. II., p. 181.

(10) (1703–4) Ibid. p. 278.

(11) (1707–8) Ibid. p. 321.

(12) (1708) Ibid. p. 332.

(13) (1708) Ibid. p. 335.

(14) (1753) Jersey Orders in Council, vol. III., p. 370.

(15) (1761) Ibid. p. 507.

(16) (1822) Jersey Orders in Council, vol. V., p. 223.

(17) Ibid. p. 223.

In re Ames (1) was a case of great importance. The Royal Court, considering the Charters and Orders in Council, and the customs of the Island, refused to grant leave to appeal to Her Majesty in Council. A petition was presented to Her Majesty for special leave to appeal. It was heard ex parte, and leave to appeal was given. On special petition of the Attorney-General for the Island it was rescinded. Baron Parke said (2): "Their Lordships are of opinion that the application to dismiss this appeal must be granted; had their Lordships' attention been directed to the law of the Isle of Jersey respecting criminal proceedings at the time of granting the Order for leave to appeal, they would never have allowed it . . . . We are disposed to say that we ought not to have recommended Her Majesty to have allowed the appeal, but we are not disposed to say that we have not the power so to have done, as Her Majesty is the head of Justice, and we are sitting here, not merely as a judicial body, but as Privy Councillors, and the matter of the former petition was referred to us generally. But we are fully aware of the difficulties which we should entail on ourselves if we were to grant appeals in matters of criminal prosecutions; . . . . we think that the Order . . . . ought not to have been granted, and must be rescinded." In *Esnouf* v. *Attorney-General for Jersey* (3) Lord Blackburn, dealing with the question of the granting of leave to appeal in criminal cases from Jersey, said: (4) "We do not say under what circumstances it might be advisable so to advise Her Majesty, but we do say, repeating the language of Baron Parke used many years ago, that it should be done very cautiously, and after great consideration." Anything more cautious than this sentence it would probably be impossible to imagine, but the feature of *Ames's* case (1) was that even where special leave to appeal had already been given, it was right to say that it ought not to have been given. [Reference was also made to *Ex parte Nicolle* (2) and *Attorney-General of Jersey and Others* v. *Capelain.* (3)]

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(1) 3 Moo. P. C. 409.
(2) Ibid. 412.
(3) 8 App. Cas. 304.
(4) Ibid. 308.

With regard to the principles on which special leave to appeal is granted, see *Nadan* v. *The King* (4) and *British Coal Corporation* v *The King.* (5) In the present case the right of the subject to present a petition has been taken away by express words, the submission is put as high as that: the King in Council is the strongest case of a competent Legislature. An Order in Council has the effect of relinquishing the Crown's right and restricting the subjects' right, because it is the proper way of legislating by a competent authority. It is stated in Bentwich's Privy Council Practice, 2nd ed., p. 78, that: " No appeal lies in a criminal case from Guernsey by virtue of an Order in Council of 1580, which declares that ' It shall not be lawful to appeal in any cause, criminal or of correction.' "

In the early days it was a mistake to draw a distinction between an appeal as of right and an appeal by special leave: it was one and the same thing at that time.

The States would be content if the Board were to make an Order in the same form as that in which Baron Parke made the Order in *Ames's* case (1), but the fuller declaration is asked for. The matter has been left open by that carefully guarded case of *Ames.* (1) This is the first occasion on which this elaborate review of all the documents has taken place. For seventy years since the Criminal Procedure Act there has never been an appeal from Jersey in a criminal matter to His Majesty in Council in the case of a verdict of a jury.

O'Sullivan K.C. and *Theobald Mathew* for the appellant. It is said that, even if there has been a grave miscarriage of justice by the Royal Court of Jersey, there is no right of appeal; and that the law is whatever the Bailiff conceives it to be in a particular case. That amounts to a claim on behalf of that Court to legislative power, of which it was expressly deprived in 1771. This state of affairs has given rise to complaints on the part of the citizens of Jersey from time to time. The Attorney-General has wholly failed to make good his claim on the preliminary point. There is a general right of appeal as stated in *Reg.* v. *Bertrand.* (1) This case falls precisely within the principle in *Reg.* v. *Bertrand* (1)—there was not a due administration of justice in the particular instance. There must be express words in order to deprive the subject of his right of approach to His Majesty: *Cushing* v. *Dupuy* (2), *In re Wi Matua's Will* (3), and *Nadan* v. *The King.* (4) There are here no express words, and there is no necessary intendment, taking away the prerogative, so much so that the Attorney-General is reduced to make a submission that "the better opinion of historians and commentators appears to be in favour of the view that no such right of appeal exists" in purely criminal cases. To deprive the King of his prerogative right and the subject of his right of approach it is not sufficient to say that the better opinion is so and so. The Attorney-General relies on the Constitutions of King John, successively confirmed, the Charter of 4 Elizabeth, 1562 (5), and the Ordinances of Pyne and Napper, 1591. The Charter of Elizabeth was not limiting the Royal prerogative, but was endeavouring to secure exclusive jurisdiction to the Islanders. Throughout that period the prerogative right of the King, and the duty of the King, to entertain appeals from his subjects in Jersey was in full force and vigour: see the Order in Council of June 22, 1565. [Reference was also made to MacQueen's Practice of the House of Lords, Privy Council and Parliamentary Divorce, p. 735.] The Jersey Code, 1771, did not favour appeals in criminal cases. In neither the Reglement Touchant Appels, 1572 (6), the

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(1) 3 Moo. P. C. 409.

(2) (1879) 5 App. Cas. 346, 349.

(3) (1842) 4 Moo. P. C. 37.

(4) [1926] A. C. 482, 490.

(5) [1935] A. C. 500, 519.

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(1) (1867) L. R. 1 P. C. 520, 529, 530.

(2) (1880) 5 App. Cas. 409, 419.

(3) [1908] A. C. 448, 450.

(4) [1926] A. C. 482, 491.

(5) Patent Roll, 4 Elizabeth, Part 3, *m.* 37. Public Record Office.

(6) Jersey Orders in Council, vol. I., p. 60.

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Regulations and Procedure in re Appeals, 1661 (1), nor the Jersey Code, 1771, is there an exclusion of appeals in criminal cases.

The Pyne and Napper Ordinances, 1591, were never authorized by the Queen or the Council, and they were never registered by the Royal Court of Jersey: *In re Belson.* (2)

[THE LORD CHANCELLOR. The Attorney-General says that they did not have to be until ninety years later.]

According to the law of the Island nothing has the force of law until it is registered, not even an Order in Council: see First (Jersey) Report of the Royal Commissioners, 1847. In Privy Council Appeals, Channel Islands, Jersey, Guernsey, Isle of Man (1861), p. 18, No. 13, under " Extract from Report of Hemery and Dumaresque," it is stated: " These [the Pyne and Napper Ordinances] are sometimes quoted and observed as laws, at other times their authority is disputed . . . . It does not appear, that they ever received the approbation of Her Majesty in Council . . . ." Before 1591, and after that date, the right of appeal in criminal cases and by way of doléance was in fact exercised: see Le Geyt, Sur les Lois, etc., de Jersey, circa 1690, where it is stated that: " Messrs. Jean de Carteret and Ph. Journeaux were allowed to appeal from a criminal sentence." In *In re Ames and Others* (3) the judge assumed that there is no regular appeal, but said that Her Majesty as the fountain of justice was entitled to entertain an appeal from one of her subjects. There was a regular defined procedure for appeals, and in none of the Regulations was an appeal in criminal cases excluded.

[Counsel then examined the early authorities cited by the Attorney-General down to *Le Sbirel* v. *Procureur-Général et Autres.* (4)] From those cases at that date the only inference to be drawn is that there were regulations for appeals from Jersey, there was a special Committee of the Council which dealt with them, and if the appeal was not excluded under the regulations there was a right to appeal provided a definitive sentence had been given, and the appeal was prosecuted within three months. If there was no appeal as of right in a criminal matter at this date, 1703, the Council exercised the prerogative and gave both parties opportunity to appeal. If the Pyne and Napper Ordinances are valid they excluded criminal appeals in toto. [Reference was also made to *De Gruchy* v. *Bailli et Procureur-Général* (1), *Ex parte Anthoine* (2), *Ex parte De Carteret* (3), Le Geyt's Constitutions et Lois de Jersey, 1847 ed., vol. IV., p. 498, and *Re George Whitfield*. (4)] In *Ames's* case (5) Baron Parke reserved the power in a proper case to grant leave to appeal, as also did Lord Blackburn in *Esnouf* v. *Attorney-General*. (6) *Attorney-General of Jersey and Others* v. *Capelain* (7) was a case in which no regular appeal lay, because the amount at stake was less than the sum appointed in the Regulation. [Reference was also made to *Nicolle, Ex parte*. (8)] No advantage is to be derived from examining the text books which express opinions both one way and the other.

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(1) Jersey Orders in Council, vol. I., p. 543.

(2) (1850) 7 Moo. P. C. 114, 119–120.

(3) 3 Moo. P. C. 409.

(4) (1703–4) Jersey Orders in Council, vol. II., p. 278.

Extensive claims have been made for the Island of Jersey, and for its privileges and immunities, even to the extent of claiming that an Act of Parliament does not apply to the Island if it is passed in the ordinary course. That argument is regarded without sympathy in Anson's Law and Custom of the Constitution, (1935) vol. II., part II., p. 57. The Attorney-General has entirely failed to show that the prerogative right of the Crown to entertain a matter of this kind has been relinquished or surrendered. The appeal ought to be heard.

Theobald Mathew followed. In none of the various instruments which have been referred to are to be found precise express words taking away the Crown's prerogative right to grant special leave to appeal, and to entertain appeals, in criminal matters from Jersey.

Sir Thomas Inskip A.-G. replied. It is difficult to put these cases logically into categories. The fact remains, however, that there are documents of undoubted authority which say that there can be no appeal from Jersey in a criminal matter, and there has in fact been no appeal in a criminal case since the Criminal Procedure Act of 1863, where sentence has been pronounced after the verdict of a jury. It is a matter of the utmost importance to the whole community of people in the Island.

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(1) (1708) Jersey Orders in Council, vol. II., p. 335.

(2) (1753) Jersey Orders in Council, vol. III., p. 370.

(3) (1761) Ibid. 507.

(4) (1838) 2 Moo. P. C. 269, 271.

(5) 3 Moo. P. C. 409.

(6) 8 App. Cas. 304.

(7) (1842) 4 Moo. P. C. 37.

(8) 5 App. Cas. 346.

The Board reserved their decision on the preliminary point, and continued to hear the appeal on the merits.

O'Sullivan K.C. To all outward appearance the trial proceeded according to the principles of the English criminal law: The Attorney-General for Jersey in his speech referred to the passage in Roberts & Gibb on Collisions on Land, 3rd ed., p. 214, as " the law of the land," and that was expressly confirmed in the Bailiff's summing up. The grounds of appeal are that the Bailiff gravely misdirected the jury (*a*) by failing to direct them as to the degree and kind of negligence that is necessary to constitute the felony of manslaughter; (*b*) by actively misdirecting them as to the elements of that offence; (*c*) by failing to direct them, and by positively misdirecting them, as to the onus of proof; and (*d*) by wrongly accepting and confirming the submission of the Attorney-General that the jury were to disregard and dismiss from their minds the conduct of the deceased immediately before the accident as absolutely immaterial and beside the point at issue before the Court. The summing up so gravely misdirected the jury as to amount to a denial of justice: *In re Dillet* (1) and *Lawrence* v. *The King*. (2) The only question in the case is, did the deceased turn back so as to meet the on-coming motor-car, or was he on one journey when he was hit? The defence was pure accident or misadventure. It was laid down in *Rex* v. *Rose* (3) that speed by itself is not evidence of criminal negligence. For the modern law of criminal negligence see *Rex* v. *Bateman*. (4) There was a definite confusion in the summing up, and the

(1) (1887) 12 App. Cas. 459.
(2) [1933] A. C. 699.
(3) (1928) 20 Cr. App. R. 164.
(4) (1925) 19 Cr. App. R. 8.

jury were directed most of the time on the principles of civil liability rather than on those of criminal liability. There was no proper direction to the jury as to the onus of proof from beginning to end: *Woolmington* v. *Director of Public Prosecutions.* (1) It is sufficient in a criminal case to establish that the defence was not put to the jury in the summing up; the explanation which the accused offered was a possible one, and might have been accepted by the jury.

[LORD THANKERTON. The jury may take the view that the evidence is inconsistent with that explanation.]

In the essentials of justice the trial was defective, and the verdict and sentence ought to be set aside.

Theobald Mathew followed.

Sir Thomas Inskip A.-G. was not called upon.

1936. April 6. The judgment of their Lordships was delivered by LORD MAUGHAM. This is an appeal, by special leave from a judgment and conviction of the Royal Court of the Island of Jersey, dated November 8, 1934. The trial of the appellant was by way of an indictment presented by and on behalf of the respondent, the Attorney-General for Jersey and took place on November 8, 1934, before the full Court, consisting of the Bailiff and eight jurats, with a jury of twenty-four. The indictment charged the appellant with having, on August 19, 1934, driven his motor car in the town of St. Helier at a dangerous speed and to the danger of the public, and with having by his criminal imprudence, carelessness or negligence (par suite de son imprudence, son impéritie ou sa négligence criminelles) collided with Frederick William Whiting, and having inflicted injuries upon him which caused his death. The appellant pleaded not guilty, but was found guilty by the unanimous verdict of the jury, and was sentenced to twelve months' imprisonment with hard labour, and his driving licence was withdrawn. Special leave to appeal was given by Order in Council, dated December 20, 1934, but without prejudice to the right of the respondent to argue that the appeal is incompetent. The contention of the respondent is that the decision of the Royal Court of Jersey in a criminal case is final, and is not open to question or appeal even with special leave of His Majesty in Council.

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(1) [1935] A. C. 462.

There are thus two entirely distinct questions for consideration : first, whether special leave to appeal from the verdict and sentence could properly be given in this or any other criminal case from Jersey, and, secondly, whether, if the answer is in the affirmative, the present appeal from verdict and sentence is within the class of exceptional circumstances in which their Lordships could advise His Majesty to intervene.

It seems to their Lordships beyond doubt that there is no right of appeal from the decision of the Royal Court in a criminal case to His Majesty in Council, using the term " right of appeal " in its proper sense. It will be remembered that (subject to certain limitations or exceptions not material to the present case) there was no right of appeal in a criminal matter, either in this country or in any of the dominions of the Crown, until a recent date (in this country the date of the Criminal Appeal Act, 1907). The verdict of the jury was for centuries considered to be conclusive.

It may be added that the Island of Jersey is not a colony, or, to use the old phrase, " a plantation ". It is part or parcel of the ancient Duchy of Normandy, which came into the possession of William, Duke of Normandy, in A.D. 933, and remained attached to the English Crown when Philip II. of France conquered the rest of Normandy from King John. It has its own constitution, and is governed by its own laws ; and, apart from enactment, it would be strange to find that there was a right of appeal properly so called in criminal matters to the King in Council. In fact, as will be seen, there is no trace in any legislation, or in any authoritative work, of any such right of appeal. The evidence is uniformly against the existence of such a right.

The question of the power of the King to admit an appeal in such a case, as an act of grace, gives rise to very different considerations. The discretion of the King in Council to grant special leave to appeal has been often described, not inconveniently, as the prerogative right; and there is a whole body of authority tending to show that this prerogative right can only be taken away by the express words or the necessary intendment of a statute or other equivalent act of state. A short account of the way in which the different methods of reaching the Sovereign as the fountain of justice—namely, by appeal as of right and by appeal after special leave obtained, have grown up, will be found in the cases of *Nadan* v. *The King* (1) and *British Coal Corporation* v. *The King*. (2) The judgment of the Board, delivered by Viscount Cave L.C., in the former of these cases, contains a reference to most of the previous decisions of the Board in which the question of the prerogative right of the Crown to grant special leave has been considered, and it is unnecessary to repeat his observations here. In dealing with the case of a Court of great antiquity, such as the Royal Court of Jersey, the question must be whether in any of the constitutions, charters, Orders in Council, or other acts of state, there is any ground for holding that the prerogative right has been taken away, bearing in mind that precise words, or the necessary effect of them, alone can result in such a conclusion.

Their Lordships have been supplied with a very complete statement of the relevant historical documents (see Appendix I. and Appendix II. to the record of proceedings); and, with the assistance of counsel, they have carefully examined the whole of these papers, whether they consist of charters, Orders in Council, letters, representations, statements of the law, Acts of the States of Jersey or other instruments or writings. They propose to deal seriatim with the main contentions of the respondent. The first point is founded on the Constitutions of King John, established in relation to the Islands of Jersey and Guernsey after Normandy was alienated. The original has long disappeared, and the precise date of it is unknown. After providing for the election of twelve jurats, who were to be sworn to keep the pleas and rights pertaining to the Crown, it was declared that they in the absence of the justices, and together with the justices "when they shall come to those parts," were to judge "touching all cases in the said Island, howsoever arising, except cases that are too difficult (exceptis casibus nimis arduis), and if any shall be lawfully convicted as a traitor of having departed from loyalty to the Lord the King or of having laid violent hands upon the ministers of the Lord the King in exercising their duty in a lawful manner." It has been conjectured that the words "and if" (et si) are a slip for "as if" (ut si). The original was in Latin and mistakes in transcription and translation are, of course, possible. Their Lordships do not propose to enter upon this question because, whatever the result, it seems to be plain that there is in this clause nothing whatever to interfere with the prerogative of the King.

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(1) [1926] A. C. 482, 491.

(2) [1935] A. C. 500, 511.

The privileges granted by the Constitutions of King John were from time to time confirmed, re-granted, and enlarged during the succeeding reigns, but nothing of any importance for the present purpose took place until the year 1562. Queen Elizabeth in that year granted, by Letters Patent under the Great Seal, a charter to the Bailiff and jurats and other natives and inhabitants of the Island of Jersey. This charter contained an elaborate confirmation of all and singular the laws and customs duly and lawfully used in the Island, and also confirmed and granted to the Bailiff and jurats and all other magistrates, officers of justice, and any other persons appointed there in any office or duty full, absolute, and complete authority touching all sorts of pleas, processes, law suits, actions, disputes and causes of any kind whatsoever arising in the Island, as well real, personal, and mixed as criminal and capital, and there and not elsewhere to plead, proceed with, prosecute, and defend all these things and in the same matters either to proceed or supersede, to examine, hear, end, acquit, condemn, decide and put their sentences in execution according to the laws and customs of the Island heretofore used and approved, and here follow the words "without any challenge or appeal whatsoever except in cases which according to the ancient custom of the Island . . . . are reserved to our royal cognisance or which by our royal right or privilege ought to be reserved." The charter was

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never regarded as taking away a right of appeal to the Queen in Council in civil cases (see the Reglement touchant Appels of May 13, 1572), and there are no words purporting to take away the prerogative of the Queen in criminal cases, the reference to the cases which by " our royal right or privilege ought to be reserved " being quite wide enough to save the special prerogative with which their Lordships are concerned. Moreover there is a saving clause in the charter in these terms: " Saving also all possible appeals and challenges of the said Island and of others dwelling or living there in all such cases which by the laws and customs of the Island and aforesaid places are reserved to our royal cognisance and examination or ought by our royal right or privilege to be reserved notwithstanding any sentence clause thing or matter whatever expressed and set out above in these presents to the contrary."

By a Commission issued by the Queen herself in 1590 to Tertullian Pyne, doctor of laws, and Robert Napper, authority was given to these commissioners amongst other things " to establish and confirme suche good orders and constitucions as by you with the advise and consent of the Captaine Bailiff and jurates and States of the saide Isle shall bee thought profitable and necessarie for the common wealthe of the said Isle and agreeable to the auncient lawes and customes thereof." Among the ordinances made and said to have been established by the said Pyne and Napper in the year 1591 in relation to the Isle of Jersey was Ordinance No. 4, relating to appeals. It begins with a recital in these terms: " And forasmuch as My Lords of Her Majesty's Privy Council are greatly importuned from time [to time] about many causes in which no definitive sentence has been given which is contrary to the ancient privileges of this Island and contrary to the express orders thereupon laid down and approved by the said Lords. And also about many appeal causes [which have been] well judged and wrongly appealed in. And about many sentences given in criminal causes or others in which no appeal lies or ought to be suffered—a thing which redounds to the great trouble of many good subjects of Her Majesty in this Isle."

For redress thereof it was ordered that " whosoever shall make any request to my Lords of the Council in such causes wherein definitive sentence has not previously been given or in any cause above specified which ought to be ordered and adjudged by the Bailiff and jurats, shall forfeit to Her Majesty her heirs and successors ten pounds sterling." The Ordinance clearly refers (amongst other matters) to an Order in Council of May 13, 1572, limiting appeals in civil cases to causes or matters over a certain value, and prohibiting appeals in any cause or matter, great or small, before a definitive sentence or other judgment having the force and effect of a definitive sentence. It is a reasonable conclusion that all the appeals mentioned in the recital are appeals as of right, and that the clause has no reference to an appeal by special leave. Here again, however, there is a saving clause in wide terms which extends to all " rights, titles and royalties and pre-eminences whatsoever which Her Majesty has had or can and might or ought to have in this Isle notwithstanding those orders, laws, and constitutions hereinbefore recited or anything herein contained which might be contrary thereto." The necessary conclusion is that the discretion of the Crown to give special leave to appeal was not taken away.

It was argued before their Lordships that the Ordinances of Pyne and Napper never became the law in Jersey. It cannot now be proved that they were ever registered in the records of the Island, or that they were ever confirmed by Order in Council. In Le Quesne's Constitutional History of Jersey (published 1856) it is even stated that there is no allusion to these ordinances in any Order in Council, and that it is probable that they were never presented at the Council Board. Further research has, however, proved that these latter statements are not correct. At a meeting of the Privy Council on September 23, 1772, a letter was read from the Lieutenant-Governor of Jersey to one of the principal Secretaries of State " recommending the repeal of certain orders established in the Island of Jersey by Royal Commissioners in the thirty-third year of the reign of Queen Elizabeth " (the reference is to an article in the Pyne and Napper Ordinances relating to punishment for signing any petition). The matter was referred to the Lords of the Committee of Council for the affairs of Jersey and Guernsey. On June 15, 1773, the Lords of the Committee having obtained from the Lieutenant Bailiff and jurats of the Island "an authenticated copy of the said ordinances," took the matter into consideration, and ordered that a copy of the ordinances be transmitted to His Majesty's Attorney-General who was required to draft "a proper instrument to be passed under the Great Seal of Great Britain for revoking and annulling the sixth article of the said ordinances established by the Royal Commissioners in the thirty-third year of the Reign of Queen Elizabeth."

In view of these orders, and in the light of the present evidence, their Lordships have felt constrained to regard the ordinances established by Pyne and Napper as having been properly confirmed by Order in Council and registered, and thus having become part of the law of Jersey. They support the view already expressed, that there is no appeal as of right in criminal matters, but they throw no light on the question of the prerogative right.

There are traces in various Orders in Council, and other documents, of causes having arisen in the Island, since the Charter of Elizabeth, in which the question whether an appeal was allowable to His Majesty in Council—sometimes as a matter of right and sometimes by special leave—has been discussed. The case of *Esnouf* v. *Esnouf et Bisson* (1) is a good instance. By an Order in Council, dated June 18, 1662, the question was raised in relation to an assault and battery alleged to have been committed by John Esnouf and Amice Bisson upon the person of Thomas Esnouf. The defendants had been condemned to pay a fine of two hundred crowns and had appealed, apparently as of right, to His Majesty in Council. The order states that the question arose "whether the matter was not so criminal as that no appeal might be permitted according to the laws and customs of the Island," and this was dealt with by ordering the Bailiff or his lieutenant and all the jurats to certify their Lordships whether, as the nature of the case and the judgment in the appeal was, an appeal was allowable to the party aggrieved and condemned by the laws and customs of the Island. No certificate from the Bailiff or his lieutenant and the jurats has been found. The Order in Council tends to support the contention that, in purely criminal cases, no appeal as of right was permitted according to the laws and customs of the Isle, but it does not touch the question of the prerogative of the Crown to grant special leave. A similar observation applies to the statements by jurats and others in text books, and in answer to questions asked by the Privy Council relating to the laws and customs of the Island of Jersey.

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(1) (1662) Jersey Orders in Council, vol. I., p. 206.

In the year 1771 a certain Code of Laws agreed upon by the States of the Island, and transmitted to His Majesty in Council for approval, was duly approved. It will have to be considered later in another connection. It is sufficient to state here that it deals with appeals in civil matters, and with the curious appeals called "doléances," which are described as odious "because they are particularly directed against the judge, whose honour must be maintained in the cause of justice." It does not, however, mention appeals in criminal matters.

Royal Commissioners were appointed in 1846 to inquire into the criminal laws then in force in the Channel Islands, and into the constitutions and powers of the tribunals and authorities charged with the execution of such laws; and in the course of their commission they made inquiries as to the right of appeal in criminal cases. In the answers, made in 1847, it was stated by various jurats that the verdict of the grand jury was final, and that no further appeal was allowed in any questions of a purely criminal nature. Several of the persons answering the questions stated that the Court, in passing sentence, always reserved a right to the party convicted of applying to His Majesty for pardon. Nothing, however, was said about the right of the Crown in Council to give special leave to appeal. The valuable Report of the Commissioners on the criminal law of Jersey, made in 1847, does not refer to the prerogative right of the Crown.

The matter had, however, come before Her Majesty in Council a few years previously in *In re Abraham Ames and Others* (1) on the petition of Her Majesty's Attorney-General for Jersey. Ames and others, masters of fishing smacks in the Island of Jersey, had been brought before the Royal Court in Jersey and sentenced to pay a fine of 300 livres and costs. There was an appeal from this sentence to the full Court, which affirmed the decision of the inferior Court. From this decision Ames, on behalf of himself and others of the defendants, prayed leave to appeal to Her Majesty, but the Royal Court refused to grant such appeal. Thereupon Ames and others presented a petition in the nature of a "doléance" to Her Majesty, praying for leave to appeal and that all proceedings consequent upon the above sentence should be stayed in the meantime. Leave to appeal was given by Order in Council pursuant to the advice of their Lordships. In the year 1841 the Attorney-General for Jersey presented a petition to the Queen in Council, complaining that the order granting leave to appeal was obtained by surprise, and praying that it might be rescinded. The Attorney-General argued that the law of the Island allowed no appeal from the Royal Court of Jersey in criminal cases, and he further argued that the Court could not entertain the matter as a "doléance" because there was no complaint against the judge. In delivering the judgment of the Board, Baron Parke stated that their Lordships were of opinion that the application to dismiss the appeal must be granted, and he added this (2): "We are disposed to say that we ought not to have recommended Her Majesty to have allowed the appeal, but we are not disposed to say that we have not the power so to have done, as Her Majesty is the head of justice, and we are sitting here, not merely as a judicial body, but as Privy Councillors, and the matter of the former petition was referred to us generally. But we are fully aware of the difficulties which we should entail on ourselves if we were to grant appeals in matters of criminal prosecutions; and under the circumstances of this case, we think that the order of the 18th July,

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(1) 3 Moo. P. C. 409.

(2) Ibid. 413.

1838, ought not to have been granted, and must be rescinded."

Similar language was used by Lord Blackburn in delivering the judgment of the Board in *Esnouf* v. *Attorney-General for Jersey*. (1) It is reasonably clear that the opinion of the Board in both cases was that in a proper case Her Majesty would be entitled to grant special leave to appeal.

On consideration of all the various matters to which their Lordships have been referred the conclusion must be that there is no Order in Council, charter, or other instrument of authority from which it can be inferred that the King's prerogative to allow an appeal, if so advised, has been taken away in criminal matters. The cases in which the Board ought to advise His Majesty to exercise his prerogative in a criminal case are of a rare and exceptional character, but that the prerogative still exists is, in the opinion of their Lordships, beyond doubt.

It is now necessary to state the nature of the case proved against the appellant at the trial. The accident took place in Weighbridge Square, St. Helier, at about 10.15 P.M. on Sunday, August 19, 1934. The appellant was driving a 24 h.p. Buick motor-car, and he had with him a friend, Mr Durell, who was sitting beside him, and was the only other occupant of the car. It was a dark night, with a moon struggling through clouds. The appellant was coming southwards, round the curve of Victoria Gardens, within about five or six yards of the pavement. Frederick William Whiting, called later the deceased, came out from the dark area which surrounded the gardens at a slow run into the path of the headlights of the car. It was asserted by the appellant and Mr. Durell that, on seeing the car, the deceased seemed undecided as to running on or stopping, but that he did turn back instead of carrying on. The car then hit him, and killed him practically instantaneously. There is no room for doubt as to the violence of the impact. Not only did the deceased suffer dreadful injuries, which need not be detailed, but the bar holding the number plate of the car and the headlamps had been bent inwards towards the radiator; a bulge was caused on the right-hand side of the bonnet, and the top of the bonnet was crumpled. A most remarkable fact, as to which there was no dispute, was that the body of the deceased was hurled through the air by the impact of the car, and was found at a distance of some 25 feet in front of the place where the car was finally pulled up. There was conflicting evidence as to the precise speed at which the car was travelling for some distance before the collision. There were skid marks on the ground behind the motor-car extending about 11 paces from the rear of the motor-car where it stopped, showing where the appellant had started to apply the brakes with vigour. The appellant, who was called as a witness, swore that the car was travelling at the moment of impact at ten miles an hour. His friend, Mr. Durell, who gave his evidence for the defence by deposition on oath before the trial (under an Order of the Royal Court), put the speed at the moment of impact at 25 miles per hour. A taxi-driver, named Matson, who saw the accident, swore that the car was travelling at an excessive speed. It is not in dispute that the car, though subjected to the brakes for some considerable distance before the collision, was yet travelling at a sufficient pace to project the body of the deceased through the air, and presumably along the ground, for a distance exceeding 25 feet, and to kill him on the spot. Their Lordships, even if they were a general Court of Appeal hearing the case, would not attempt to usurp, however remotely, the functions of the jury, and the facts above stated are mentioned only to explain the questions which arise for consideration on special leave to appeal granted in a criminal case. They are content here to observe that the undisputed evidence was sufficient to justify a conclusion by the jury that the car was being driven by the appellant with gross negligence in relation to, and with entire disregard of, the safety of other persons using the road, in the sense that it was being driven at night at an excessive speed, and to the danger of the public in the town of St. Helier.

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(1) 8 App. Cas. 304.

The case was tried, as already stated, before the full Court of the Royal Court of Jersey, consisting of the Bailiff and eight jurats, with a jury of twenty-four. The Bailiff is a trained lawyer, and doubtless his views on questions of law are treated with great respect; but the jurats, who are appointed for life, and who need not have any legal qualification, have, at any rate in theory, the same right of summing-up the case as the Bailiff, and of expressing their own views of the law, and some of them are not only lawyers but, no doubt, possess considerable experience in connection with the proceedings of the Royal Court in criminal matters. In the present case the learned Bailiff (as is usual) alone summed-up the case to the jury, and in so doing explained to them the law as to manslaughter. After some prefatory remarks he referred to the statement of the law by the Attorney-General, which was in these terms: "Fortunately, the law upon this subject is one which is abundantly clear, and it can be set out in a minimum of words. The law is this: 'Any person causing the death of another by gross negligence in the performance of a legal duty owed to that other, is guilty at least of manslaughter.' That is the law of the land, as clear a statement of law as any statement can be. Now, you have also to bear in mind, and I place it in the very forefront of my address to you this fact, that the question of whether the victim in a case of this kind contributed to his own death or not by any negligence on his part is, so far as you, as a jury, are concerned in arriving at your verdict, absolutely immaterial and beside the point . . . . The law is very clear. The charge of manslaughter cannot be maintained unless it is proved that the negligence of the prisoner is the proximate cause of the death."

The Bailiff adopted this statement and said: "The Attorney-General has told you the law, and he has told you very plainly and correctly; he has told you that every user of the King's highway owes to every other user the duty of doing everything in his power to avoid danger or damage to the other user. You have to decide whether the accused did all a sensible man would have done to avoid danger when he saw a human being in front of him. In civil law contributory negligence is a defence. In criminal law is it no defence at

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all. You know that the vehicle driven by the accused killed Whiting, and he is accused by the Crown of having killed him owing to the fact that he drove at a dangerous rate and to the danger of the public and by his imprudence or lack of skill criminally killed that man. The whole case comes down to the question of speed and the precautions taken. You have to decide whether the vehicle was taken at a suitable and proper pace over the place of the accident, under suitable and proper control, and whether all reasonable steps that a skilful and sensible driver could have taken were taken . . . ."

He concluded as follows: "It is for you to judge whether the accused, by his negligence or carelessness or recklessness, did not fail in the duty he owed to that pedestrian. If you think that no reasonably skilful driver could have avoided an accident under the circumstances which occurred, you will acquit the accused, but if you think that the circumstances show that there was a carelessness, a negligence, a lack of skill, call it what you will, by means of which the accused, instead of being in a position to meet and to cope with the sudden emergency, was not in such a position, or that he was going at such a pace that the driver was unable to stop his car, again it is for you to say that that was wrong."

The appellant's ground for appeal is based upon the alleged defects of this summing up. It is contended that the Bailiff left the jury under the impression, amongst other things, not only that the question of the contributory negligence of the deceased was altogether immaterial, but that the appellant must be convicted unless the evidence established that he had taken all the steps that a skilful and sensible driver could have taken, and that he could only be acquitted if the jury were satisfied that the death of the deceased was due to a pure accident or misadventure, such an accident as no reasonably skilful driver could have avoided. Their Lordships are far from saying that the summing up in question is not open to criticism, and they are not to be taken as expressing any opinion as to the course which would, or might, be taken in a general Court of Criminal Appeal if such a summing up were before them. They observe, however,

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that the Attorney-General for Jersey began by stating the law (assuming that the law of Jersey in this case is similar to that of England) in unobjectionable terms, and that his statement was adopted by the Bailiff. Indeed, phrases are used which are taken from an English text-book (Law of Collisions on Land, by Roberts & Gibb, 2nd ed., pp. 189 to 195). The Bailiff himself stated plainly that the appellant was accused by the Crown of having killed the man owing to the fact that he drove at a dangerous rate and to the danger of the public, and " by his imprudence or lack of skill criminally killed him." It is doubtless unfortunate that, in the latter part of his address, the Bailiff left out (to use the language of Lord Hewart L.C.J. in *Rex* v. *Bateman* (1) cited below) (2) " some of the adjectives which have always been used in explaining criminal negligence " to a jury, and that some sentences, taken alone, are consistent with the view that a hostile verdict might be given on the ground of mere carelessness, negligence or lack of skill such as would justify a verdict in a civil case.

On the other hand, their Lordships have noted that the Attorney-General had stated the law as being that any person causing the death of another by gross negligence in the performance of a legal duty owed to that other, is guilty at least of manslaughter, and that the speech of the advocate for the defence referred repeatedly, and without being contradicted, to the fact that there was no homicide unless the defendant had been guilty of " negligence tantamount to criminal negligence."

Moreover, there are other difficulties which interpose themselves. In the first place, it is by no means clear to their Lordships that the law of Jersey on the subject of manslaughter as the result of a collision on land is precisely the same as that which exists in this country. The criminal law of the Island of Jersey is, and has long been, in a remarkably fluid state. Historically it should begin with the great repository of early Norman law, the Grand Coûtumier of Normandy ; but, unfortunately, this work is very defective in relation to crime, for, although some chapters treat of criminal suits and others make mention of crimes and misdemeanours, the punishments are not specified in either, and no corporal punishment, short of death or loss of limb, is anywhere mentioned. There appear to be no Orders of His Majesty in Council, or ordinances of the States sanctioned by royal authority, which throw light upon the general question of crime, except in the cases of some particular crimes with which their Lordships are not here concerned. In the year 1689 the Attorney-General for the Island made a report to the King's Privy Council in which he stated that according to the laws of the Island there was no distinction made betwixt wilful murder, manslaughter, and "chance medley." This report was approved by His Majesty in Council, and (after discharging a certain prisoner from his imprisonment) His Majesty was pleased to order that if for the future it should appear by good evidence to the Royal Court in Jersey upon the trials of any persons for murder, manslaughter, and chance medley, that there was no premeditated malice, and that the parties were fit objects of mercy, the judges of the said Court should, upon such occasions, suspend all further proceedings against the criminal until His Majesty was made acquainted with the state of their respective cases and His Royal pleasure should be signified thereupon, and the Bailiff and jurats of the Island of Jersey, and all others concerned, were to take notice and to cause the order to be registered in the Royal Court of the Island. It may be mentioned here that Orders in Council are registered by the Royal Court, and are not binding as law until such registration has taken place.

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(1) 19 Cr. App. R. 8.

(2) Ibid. 16.

Apart from the Code of Laws of 1771, to which reference must again be made, there seems to be nothing in the nature of a written law of Jersey dealing with crimes. By the Order of March 28, 1771, approving the Code, it was declared that "all other political and written laws heretofore made in the said Island and not included in the said Code, and not having had the Royal Assent and confirmation shall be from henceforward of no force and validity." Some doubt has been expressed as to the meaning to be attached to these words, but to their Lordships it seems clear that the clause is dealing only with written laws, and is not in any way affecting customary laws. The Code contains, however, only one criminal enactment, that is a provision as to persons who are accessories of criminals, and to prison breakers and persons aiding them. It appears from the first (Jersey) report of the Royal Commissioners appointed in 1846 (above referred to) for inquiring into the criminal laws of the Channel Islands, that there was not in any Act, Order in Council, or even in any work of authority published in Jersey, any specific definition of crimes or their punishments. So far, indeed, as specific enactment is concerned, the law in reference to manslaughter would seem to be in the same state as it was in the year 1689. In fact, however, there has been a long established practice in Jersey which has apparently permitted the Royal Court to introduce alterations in regard to the criminal law and its punishment, and particularly in the direction of mitigating the severity of the ancient Norman practice. The law of Jersey was, indeed, during the 18th century considerably more humane than that of England. For example, whilst hanging was the necessary punishment for sheep stealing in England, in Jersey the delinquent was only " exposed to be whipt," and whilst simple theft was a capital crime in England, in Jersey the criminal forfeited his life only on conviction of a third offence. In modern times, however, it has been usual to refer to English legal works and precedents as authorities, and the Royal Court has in many cases regarded the English law as a guide in laying down the modern law of Jersey.

According to the Commissioners who made the report of 1847, this de facto alteration of the criminal law is due to two circumstances. In the first place, the Royal Court, until the Order in Council of 1771, possessed the power of legislation, and while that legislative power existed it is easily to be understood that the members of the Court would not regard themselves as bound to adhere to the previous law in a particular case ; more particularly when the ancient law was of an exceedingly harsh character, and had ceased to accord with the general feelings of the inhabitants of the Island. This laxity in the application of the existing law seems to have continued after the Royal Court had ceased to possess its power of legislation. On the other hand, the peculiar and the popular nature of the ancient tribunal called the Royal Court has contributed to the system of treating the law as not being of a rigid character. The jurats are chosen by a system of election by a widely extended suffrage, the persons selected having seldom received any legal education. They are tempted to act upon their individual notions of justice. Criminal law in Jersey thus rests almost entirely on the modern practice of the Royal Court, and this tends more and more to imitate English models. It may not be improper to add that a similar practice has been adopted in a number of British Dominions, including those where English law does not prevail, without in many cases any statutory authority for such a course.

There are thus difficulties in laying down for Jersey the same strict rules as to a summing up to a jury which have been formulated in this country in their definite form since the institution of a Court of Criminal Appeal. There are in the full Court not less than eight judges in all, the Bailiff or his deputy and not less than seven jurats, all of whom have an equal right to address the jury; and the fact that that right might be exercised by several of them in terms which might be by no means identical, makes the criticism of the observations of the Bailiff and jurats a matter of some delicacy. The peculiar and special constitution of the Royal Court, and the curiously fluid state of the criminal law, afford reasons for hesitating to interfere with a verdict on the ground of a summing up alleged to be objectionable. It may be useful to repeat that the Board has always treated applications for leave to appeal, and the hearing of criminal appeals so admitted, as being upon the same footing. As Lord Sumner, giving the judgment of the Board in *Ibrahim* v. *The King* (1) remarked (2): " The Board cannot give leave

(1) [1914] A. C. 599.

(2) Ibid. 615.

to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it." He added, what is material in the present case: "Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea.* (1) There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg.* v. *Bertrand.* (2)"

It is unnecessary to repeat the well-known observations of Lord Watson in relation to a review of criminal proceedings before the Privy Council in *In re Dillet.* (3) The appellant relied upon some observations in the judgment of the Board in *Lawrence* v. *The King* (4), as involving that the omission of the judge to direct the jury as to the onus of proof, and to tell them that the accused is entitled to the benefit of any reasonable doubt is, of itself, such a miscarriage of justice as will lead this Board to set aside the conviction. But the passage relied on clearly does not lay down any such narrow doctrine. It recognizes that the question is whether the jury had present to their minds the governing principle of our law as to onus of proof, and that the jury may have this present in their minds otherwise than by any direction of the judge. The particular circumstances of that case, the various groups of charges, and the way in which they were dealt with in the course of the trial, the form of the directions by the judge, and the form of the verdict, made it reasonably certain that the jury did not have the principle as to onus of proof clearly before their minds, and it was held by the Board that the appellant had sufficiently established the miscarriage of justice. The decision is not to be regarded as modifying the burden laid on an appellant before this Board by the ruling in *Dillet's* case. (3) In the case of misdirection, as in any other case of an alleged failure

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(1) [1893] A. C. 346.

(2) (1867) L. R. 1 P. C. 520.

(3) 12 App. Cas. 459.

(4) [1933] A. C. 699, 707.

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in the proper trial of a criminal case, the Board give advice to His Majesty to intervene only if there is shown to be such a violation of the principles of justice that grave and substantial injustice has been done. The Board has repeatedly declined to act as a general Court of Criminal Appeal; and, even if English law were shown to be applicable in all its details, a failure to state the law in the summing up to the jury in the terms carefully considered and expounded in *Bateman's* case (1), or to insist more clearly on the onus of proof lying upon the prosecution, would not, in the opinion of their Lordships, necessarily establish that there had been a serious miscarriage of justice. Apart from the circumstance that a summing up in the Dominions or abroad is often imperfectly reported (if it is reported at all), admissions by the prosecuting counsel, or other incidents in the course of the trial, may well have sufficiently brought home to the minds of a jury some factor in the case, or some principle such as that of the onus of proof, which might appear to have been omitted from the summing up of the judge.

On a careful review of the facts in the present case, their Lordships are unable to come to the conclusion that there has been here a violation of legal principles resulting in grave and substantial injustice, and they must accordingly humbly advise His Majesty that the appeal be dismissed.

Solicitors for appellant: *Charles Russell & Co.*
Solicitor for respondent: *The Treasury Solicitor.*

(1) 19 Cr. App. R. 8, 13.

[PRIVY COUNCIL.]

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May 20.

COMMISSIONER OF INCOME-TAX, BENGAL . . . . APPELLANT;

AND

MERCANTILE BANK OF INDIA, LIMITED, AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

India—Revenue—Supertax and surcharge—Company's reserves—Undistributed profits—Capitalization—Issue of bonus debentures to shareholders—Redemption—Not taxable income, profits, or gains received by shareholders—Indian Income-tax Act (XI. of 1922), *s.* 4; *s.* 66, *sub-s.* 1.

An investment company, carrying on business in India, capitalized its accumulated undistributed profits and issued to its shareholders bonus debentures, which were subsequently redeemed:—

Held, that the shareholders did not, as the result of those transactions, receive any taxable income, profits or gains within the meaning of s. 4 of the Indian Income-tax Act, 1922.

Inland Revenue Commissioners v. *Blott* [1921] 2 A. C. 171, and *Inland Revenue Commissioners* v. *Fisher's Executors* [1926] A. C. 395, applied.

Swan Brewery Co., Ld. v. *The King* [1914] A. C. 231, distinguished.

The personal motive or purpose of the individual shareholders, even if they hold a controlling interest in the company, is irrelevant, if it is made out that the company has in fact capitalized the accumulated profits.

Dicta of Lord Sumner in *Inland Revenue Commissioners* v. *Fisher's Executors* [1926] A. C. 395, at p. 411, referred to.

Judgment of the High Court affirmed.

APPEAL (No. 34 of 1935) from a judgment of the High Court at Calcutta (March 13, 1934), delivered upon a reference of questions of law under s. 66, sub-s. 1, of the Indian Income-tax Act, 1922.

The questions of law arose in the course of an assessment for supertax and surcharge made by the income-tax officer upon the respondents, as trustees of the late Sir David Yule, for the year ended March 31, 1932, in respect of Rs.5,71,30,000, being the nominal amount of certain bonus debentures issued to them in respect of their shareholding in certain companies in the year ended March 31, 1931. Sir David Yule died on July 3, 1928, leaving a very large estate which mainly consisted of holdings of shares in thirty companies, with twenty of which the present appeal is concerned, being the companies which issued the debentures in question. The circumstances in which the debentures came to be issued to the respondents or their nominees were stated by the High Court as follows: "All the companies had very large accumulations of undistributed profits. . . . . The trustees had to meet very heavy outgoings for duties both in the United Kingdom and in India in relation to the estate of the deceased, and it was to provide funds for such duties that a scheme was devised whereby accumulated profits would come into their hands and be available for the purpose of meeting such charges. . . . . The proposal was to capitalise the companies' reserves and make a distribution to the shareholders in the form of debentures on redemption of which the funds required would be available." That policy having been effected, the income-tax officer on August 5, 1933, made an assessment on the trustees for the year 1931–32 based on the financial year 1930–31 in respect of Rs.5,71,30,000 debentures received by them in 1930–31.

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* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MAUGHAM, SIR SIDNEY ROWLATT, and SIR SHADI LAL.

The respondents appealed to the Assistant Commissioner, Calcutta, and while the appeal was pending the Commissioner, of his own motion, made the present reference to the High Court, namely: "The assessee being in his own name and through nominees the holder (*a*) of the whole of the share capital of companies as specified in the case, and (*b*) together with two trustees in their individual capacity, of the whole of the share capital of one company as specified: these companies being investment companies of the nature described in the case: and the said companies having issued to the assessee, by way of bonus, debentures which have subsequently been paid-off through the transaction specified in the case: . . . . (*quaere*) was there by these transactions

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any income, profits or gains which accrued or arose to or were received by the assessee, within the meaning of s. 4 of the Indian Income-tax Act, 1922."

The procedure by which the debentures were allotted appears from the judgment of the Judicial Committee.

The High Court (Buckland A.C.J., Costello and Panckridge JJ.) decided against the claim of the Crown, and answered the question in the negative.

Buckland A.C.J., with whose judgment the other judges concurred, was of opinion that the case was covered by the reasoning and decision in *Inland Revenue Commissioners* v. *Fisher's Executors* (1), and that the decision in *Swan Brewery Co., Ld.* v. *The King* (2) could be distinguished.

1936. March 27, 30. *Dunne K.C.*, *Gavin Simonds K.C.* and *Reginald Hills* for the appellant. The question is, what is the real nature of the transaction? The shareholder has had credited to him out of the accumulated profits fund the money which paid for the debentures, and he clearly comes within the principle in *Swan Brewery Co., Ld.* v. *The King.* (2) The judgment in that case found that what was distributed was in effect a dividend, although it was not declared to be a dividend. *Bouch* v. *Sproule* (3) was the basis of the decision in *Inland Revenue Commissioners* v. *Blott* (4), and the matter really turns on those two cases and the *Swan Brewery Co.'s* case. (2) In *Blott's* case (4) the whole of the accumulated profits were invested in other assets. The decision in the *Swan Brewery Co.'s* case (2) governs this case. In *Blott's* case (4) Lord Dunedin came to the conclusion that the principle in the *Swan Brewery Co.'s* case (2) was the correct one—that the real transaction must be looked at, and not merely, as in *Bouch* v. *Sproule* (3), the statements of the company as to what they were doing. The *Swan Brewery Co.'s* case (2) correctly states the true principle to be applied in construing the Indian Income-tax Act—has or has not the shareholder received a profit or a gain? *Inland Revenue*

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(1) [1926] A. C. 395.
(2) [1914] A. C. 231.
(3) (1887) 12 App. Cas. 385.
(4) [1921] 2 A. C. 171.

Commissioners v. *Fisher's Executors* (1) is on a different plane altogether: here it is simply the Indian Act which is being dealt with. *Whitmore* v. *Inland Revenue Commissioners* (2) was heard after the Court of Appeal had decided *Fisher's* case (3) but before it was heard in the House of Lords.

[LORD MAUGHAM. *Whitmore's* case (2) is rather a serious case for you, unless you can distinguish it by a case in India.]

Two cases, which proceeded on exactly the same footing as did Buckland A.C.J. in the present case—namely, that *Blott's* case (4) concluded them for India—are *Steel Brothers & Co., Ld.* v. *Government* (5), and *Income-tax Commissioner, Madras* v. *Binny & Co.* (6). They were both cases of shares. "The object of the Indian Act is to tax 'income,' a term which it does not define. It is expanded, no doubt, into 'income, profits and gains,' but the expansion is more a matter of words than of substance": per Sir George Lowndes in *Income-tax Commissioner* v. *Shaw, Wallace & Co.* (7)

On the findings of fact it is found that this company never intended to capitalize this money for the purposes of the business, or to retain it for such purposes, but that what was done was effected in agreement with the shareholders for the purpose of getting the money distributed into the hands of the shareholders. In *Bouch* v. *Sproule* (8), *Blott's* case (4), and similar cases there was a real capitalization, intended to be such for the purposes of the company, and in most of them, if not all, the actual profits had been expended in matters of business for the purposes of the company. They were all mercantile businesses for purposes quite different from those of this company, which is merely an investment company to collect the moneys which come in upon investments. The machinery of the scheme between the company and its shareholders is adopted not for the purpose of doing something for the benefit of the company, but for the purpose of doing something for the benefit of the shareholders—to

(1) [1926] A. C. 395.
(2) (1925) 10 Tax Cas. 645.
(3) 10 Tax Cas. 302.
(4) [1921] 2 A. C. 171.
(5) (1924) I. L. R. 2 R. 211.
(6) (1924) I. L. R. 47 M. 837.
(7) (1932) L. R. 59 I. A. 206, 212.
(8) (1887) 12 App. Cas. 385.

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pass the money to them. That is absolutely different from a case where a company, presumably bona fide, enters into the transaction for the benefit of the business of the company, as in *Bouch* v. *Sproule* (1) and *Blott's* case. (2) From the point of view of the Indian Act, if what the shareholders received was a profit or gain it was income: *Swan Brewery Co.* v. *The King.* (3) Under their articles of association the company could declare a bonus or a dividend. The question is whether *Bouch* v *Sproule* (1) and *Blott's* case (2) were binding in India, or whether the *Swan Brewery Co.'s* case (3) applied. *Bouch* v. *Sproule* (1) and *Blott's* case (2) do not apply; the *Swan Brewery Co.'s* case (3) does: it is an error to say that that case merely turned upon the definition clause in the Western Australian statute; that is not the real decision; it lays down that the real transaction must be looked at and analysed, and that is what Lord Sumner said, not only in that case, but also afterwards when referring to the *Swan Brewery Co.'s* case (3) in *Blott's* case (2). Looking at the real transaction here, there is undoubtedly a crediting to the shareholders: the payment by the company is to be made on behalf of the shareholders, it is to be credited to them, they are to pay no further money, and that is the way in which it comes as a loan from the shareholders to the company. If that is so, the rule in the *Swan Brewery Co.'s* case (3) is perfectly right and is applicable here. The shareholders get that money precisely upon the footing of their right pro rata in the capital of the company. The source from which they are getting this is their investment as shareholders. The debenture stock is saleable in a company such as this, and if that be so, can it be said that it is no profit or gain to a shareholder to receive an allotment of a share of accumulated profits to be used for the purposes of a loan to the company upon debenture stock which is redeemed? That is the real problem which arises on the Indian Act: if he makes a loan it must be on the hypothesis that the money is his.

(1) 12 App. Cas. 385.
(2) [1921] 2 A. C. 171.
(3) [1914] A. C. 231.

Gavin Simonds K.C. followed. The question is whether the Board, if it thinks fit, is, for the purposes of the Indian Income-tax Act, 1922, at liberty to adopt the analysis of such a transaction as the present one which was adopted by the minority in *Blott's* case (1), and to adopt the reasoning in *Swan Brewery Co.* v. *The King.* (2) The reasoning of the majority in *Blott's* case (1) and that in *Fisher's* case (3) is not such as should be applied to a case where the transaction is really a blind, not representing the intention of the company to enlarge its capital, whether share or loan, but simply to provide a means of distribution of undistributed capital. The line of reasoning in the *Swan Brewery Co.'s* case (2) and by Lord Dunedin in *Blott's* case (1) is right. The majority of the House of Lords in *Blott's* case (1) did not give sufficient weight to the principle running right through income tax law, that it does not matter in the least whether a recipient receives money which has to be applied in a particular way, it is none the less income, profit or gain, even though he never gets it at all, if it is applied on his behalf; *Mersey Docks* v. *Lucas* (4); *Roe* v. *Inland Revenue Commissioners.* (5) The present case is stronger than the latter of those cases, because it is the will of the shareholder himself that his money shall be applied in a particular way, without it ever reaching his hands. The logic of it is really unanswerable; it is the income of the shareholder which, by his direction, is applied in a particular way. [Reference was also made to *Inland Revenue Commissioners* v. *Wright.* (6)] There is a substantial body of opinion which considers the reasoning in *Blott's* case (1) and *Swan Brewery Co.* v. *The King* (2) irreconcilable: see observations of Lord Finlay (7) and of Lord Cave (8) in *Blott's* case. (1) If the Board is of opinion that the reasoning in the *Swan Brewery Co.'s* case (2) is right, it is at liberty to follow it, and is not bound, on the Indian Income-tax Act, by the decision of the House of Lords. All that it is necessary to decide is that that which the subject receives is a profit

(1) [1921] 2 A. C. 171.
(2) [1914] A. C. 231.
(3) [1926] A. C. 395.
(4) (1883) 8 App. Cas. 891.
(5) (1924) 8 Tax Cas. 613.
(6) [1927] 1 K. B. 333, 346.
(7) [1921] 2 A. C. 199.
(8) Ibid. 202.

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or gain of an income character. The question is whether, even if *Blott's* case (1) is right, still, looking at the present transaction as a whole, this is a case where the debentures do represent income of the shareholders, because the real intention of all parties was not that the loan capital of the company should be increased, but that the distributable profits should be distributed to the shareholder just as and when it was necessary for him to have them. Where the scheme is a mere cloak or device, not representing the needs of the company for the increase of its capital, loan or share, but simply aims at distributing to the shareholders the undistributed income in a particular way, then *Blott's* case (1) has no application.

Latter K.C., *L. P. E. Pugh* and *J. B. Lindon* for the respondents, were requested by the Board to confine their argument to the question whether the Board was entitled to look behind the acts of the company to the nature of the transaction.

The first point is that neither the income nor the assets of the company are the income or the assets of the shareholders : secondly, there can be no income to the shareholders until the company has released some of its assets to them : thirdly, when it releases assets to them it may do so in the form of income or of capital, and it is the action of the company, and I stress the word " action," which determines which it is. These are the three fundamental points. If these are the principles which underlie the two cases in the House of Lords, then what the shareholders meant to do when they caused the company to go through these various acts, whatever they may have been, is not material, because the question is, what is the act of the company ? [Reference was made to *Blott's* case (1), to *Fisher's* case (2), and to *Inland Revenue Commissioners* v. *Westminster* (*Duke*). (3)] If the act of the company represents the legal result, all speculation as to the intention of the shareholders becomes entirely irrelevant. In *Blott's* case (1) Lord Haldane said (4) that the company could convert its accumulated profits into capital, and that the only question was "whether the company has really done so"; Lord Cave said (1) that the most important document was the resolution of the company. In *Fisher's* case (2) Warrington L.J. said (3): "the action of the company then being the determining factor," and he inquires what the company did. In *Wright's* case (4) Lord Hanworth M.R. asked (5): "What is the intention of the company, expressed and to be found in the terms of the resolution adopted. . . ."

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(1) [1921] 2 A. C. 171.
(2) [1926] A. C. 395.
(3) [1936] A. C. 1.
(4) [1921] 2 A. C. 182.

Gavin Simonds K.C. replied. If the transaction as appearing from the documents is in effect merely cloaking another transaction, then it can be looked through to see what is the real transaction. This is the first case, apart from *Whitmore's* case (6), where a scheme of this kind has been devised, and where it is perfectly plain on the face of the documents that they do not tell the whole story—not that they are fictitious—and the whole story is that the moneys were required and were to be made available for the shareholders: it was not to supply any need of the company that this arrangement was made: the substance of the transaction was that it was intended to do no more than provide money for the shareholders, it is nothing more than machinery for distributing the profits.

May 20. The judgment of their Lordships was delivered by

LORD THANKERTON. This is an appeal from a judgment of the High Court of Judicature at Fort William in Bengal, delivered on a reference of questions of law by the Commissioner of Income-tax, Bengal, under s. 66, sub-s. 1, of the Indian Income-tax Act, 1922 (XI. of 1922).

These questions of law arose in course of an assessment for supertax and surcharge made by the Income-tax Officer upon the respondents, as trustees of the late Sir David Yule, for the year ending March 31, 1932, in respect of Rs.5,71,30,000, being the nominal amount of certain bonus debentures issued to them in respect of their shareholding in certain companies in the year ending March 31, 1931. The respondents appealed to the Assistant Commissioner, Calcutta, and, while the appeal was pending, the Commissioner, of his own motion, made the present reference to the High Court, asking the following questions of law, namely:

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(1) [1921] 2 A. C. 200.
(2) 10 Tax Cas. 302.
(3) Ibid. 322.
(4) [1927] 1 K. B. 333.
(5) Ibid. 342.
(6) 10 Tax Cas. 645.

" *First Question.*—The assessee being in his own name and through nominees the holder (*a*) of the whole of the share capital of companies as specified in the case, and (*b*) together with two trustees in their individual capacity, of the whole of the share capital of one company as specified: these companies being investment companies of the nature described in the case: and the said companies having issued to the assessee by way of bonus, debentures which have subsequently been paid-off through the transaction specified in the case: . . . . (*quaere*) was there by these transactions any income, profits or gains which accrued or arose to or were received by the assessee, within the meaning of s. 4 of the Act?

" *Second Question.*—If any such income did arise, when did it so arise?

" *Third Question.*—If any such income did arise, was its quantum an amount corresponding (*a*) to the full amount of the debentures or (*b*) to such part only as derived from the received and accumulated revenue profits of the companies, and excluding such part as derived from appreciated valuations of the companies' investment-holdings?

" *Fourth Question.*—In the latter alternative, on what principles are the respective quanta to be accounted and ascertained?"

The parties were agreed in asking for the decision of the Board on the first question only. The facts are fully set forth in the statement of the case by the Commissioner, but they may be summarized as follows: Sir David Yule died on July 3, 1928, leaving a very large estate, which mainly consisted of holdings of shares in thirty companies, with twenty of which the present appeal is concerned, being the companies which issued the debentures in question. The

Commissioner has divided these twenty companies into two groups; in the first group all the capital was ordinary share capital, wholly held by the trustees in their own name or through nominees, the trustees being the beneficial owners of all the shares, and the debentures were issued wholly in the names of the trustees. In the second group, the trustees and their nominees did not hold all the ordinary share capital, the other shares being held by others of the thirty companies, and in one case, that of the Calcutta Discount Co., Ld., certain shares were held by two of the trustees individually. In the case of each company in the second group an issue of preferred ordinary shares was made to the trustees alone, and the debentures in question were thereafter issued to the trustees in respect of their holding of the preferred ordinary shares.

For the purposes of the argument before their Lordships no distinction was drawn between the two groups of companies as regards the procedure under which the debentures came to be issued, and the procedure of the Calcutta Discount Co., Ld., was taken as sufficiently typical of the procedure of all the companies for that purpose.

The following is an extract from a special resolution of that company, passed on January 3, 1930, and confirmed on January 22, 1930:—

"2. That the capital of the company be increased by the creation of 725 preferred ordinary shares of Rs.100 each, and the same be issued to such persons as the secretaries may think fit.

"(*a*) The preferred ordinary shares shall rank in priority to the ordinary shares both as to dividend and repayment of capital, and shall carry the right to a non-cumulative dividend of such amount as may be declared by the company in general meeting, but so that the ordinary shares shall not be entitled to any dividend in any year unless and until at least 5 per cent. has been declared on the preferred ordinary shares for that year. The said preferred ordinary shares shall have no further right to participate in profits or surplus assets in a winding-up.

"(*b*) The date from which such shares shall rank for dividend shall be January 1, 1930, or such later date as the secretaries shall think fit."

Of these 725 preferred ordinary shares, 629 were allotted to the respondents, as trustees of the estate of the late Sir David Yule, and the residue (96) partly to one trustee and partly to another.

At the same time the Calcutta Discount Co., Ld., adopted a new article as article 126 of its articles of association, from which the following is an extract: "126. The company in general meeting may at any time and from time to time pass a resolution that any sum not required for the payment or provision of any fixed preferential dividend and (*a*) for the time being standing to the credit of any reserve fund or reserve account of the company, including premiums received on the issue of any shares, debentures or debenture stock of the company, or (*b*) being undivided net profits in the hands of the company, be capitalised, and that such sum be set free for distribution, and be appropriated as capital to and amongst the preferred ordinary shareholders and ordinary shareholders respectively in the proportions in which they would have been entitled thereto if the same had been surplus distributable profits, and in such manner as the resolution may direct, and such resolution shall be effective; and the secretaries shall in accordance with such resolution apply such sum in paying up in full any unissued shares in the capital or any debentures or debenture stock of the company on behalf of the shareholders concerned, and appropriate such shares, debentures or debenture stock, and distribute the same credited as fully paid-up amongst such shareholders in the proportions aforesaid in satisfaction of their shares and interests in the said capitalised sum, or shall apply such sum or any part thereof on behalf of the shareholders aforesaid in paying up the whole or part of any uncalled balance which shall for the time being be unpaid in respect of any issued shares of any of the said classes held by such shareholders or otherwise deal with such sums as directed by such resolution."

The following is an extract from minutes dated March 14, 1931 :—

"CALCUTTA DISCOUNT CO., LD.

"Minutes of the Secretaries, dated March 14, 1931.

"The secretaries having taken into consideration the financial position of the company and being satisfied that such position justified the distribution from the reserve fund of Rs.1,45,00,000 in the form of a special capital bonus free of income tax it was decided to recommend to the shareholders the payment of such a special capital bonus to be satisfied by the distribution among the members holding preferred ordinary shares in the company on March 24, 1931, of Rs.1,45,00,000 of debentures carrying interest at 3 per cent. per annum from January 1, 1931, in proportion to the number of preferred ordinary shares respectively held by such members.

"The notice convening the requisite meeting having been prepared it was decided to issue the same to the shareholders.

"Andrew Yule & Co., Ld.,
"(Sgd.) J. SIME,
"Managing Director,
"Secretaries."

At an extraordinary meeting of the Calcutta Discount Co., Ld., held on March 24, 1931, the following resolutions were passed :—

"(1.) That it is desirable to capitalise a sum of Rs.1,45,00,000 being part of the amount standing to the credit of the reserve fund and accordingly that a special capital bonus of Rs.1,45,00,000 free of income tax be declared and such capital bonus be applied on behalf of the persons who on March 24, 1931, were the holders of the 725 issued preferred ordinary shares of the company in payment in full for Rs.1,45,00,000 of debentures of the company carrying interest at 3 per cent. per annum from January 1, 1931 (and to be charged upon the whole undertaking of the company)."

"(2.) That . . . . the secretaries be and they are hereby authorized to create and issue such debentures as a special capital bonus free of income tax credited as fully paid and to distribute the same to the holders registered on March 24,

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1931, of the 725 preferred ordinary shares in the company's capital in proportion to the number of such shares held by them respectively in full satisfaction of such capital bonus as aforesaid."

The following is an extract from the minutes:—

"CALCUTTA DISCOUNT CO., LD.

"Minutes of the Secretaries, dated March 25, 1931.

"The resolution passed at the extraordinary general meeting of the company held on March 24, 1931, that it was desirable to capitalise Rs.1,45,00,000 being part of the company's reserve fund having been considered and it was decided to create and issue a series of debentures of a total nominal value of Rs.1,45,00,000 consisting of 28 debentures of Rs.5,00,000 each, one debenture of Rs.4,00,000 and five debentures of Rs.20,000 each all carrying interest at the rate of 3 per cent. per annum and to distribute the same to the holders registered on March 24, 1931, of the 725 issued preferred ordinary shares in proportion to the number of such shares held by them respectively in full satisfaction of the capital bonus. One debenture for Rs.5,00,000 was thereupon sealed and directed to be registered with the registrar of joint stock companies and that on obtaining the registrar's certificate the remaining debentures be sealed and issued."

As a result of the foregoing proceedings debentures of the Calcutta Discount Co., Ld., to the amount of Rs.1,25,80,000 were issued to the respondents, the residue of the issue being allotted severally to the two trustees who each held a small quantity of the preferred ordinary shares.

The debentures are dated March 24, 1931, and the amounts secured were repayable at latest on December 31, 1940, and were repayable at the option of the company at any time after three months' notice.

The circumstances under which these debentures came to be issued are conveniently summarized in the judgment of the High Court as follows: "All the companies had very large accumulations of undistributed profits. The actual figures are immaterial. The trustees had to meet very heavy outgoings for duties both in the United Kingdom and in

India in relation to the estate of the deceased, and it was to provide funds for such duties that a scheme was devised whereby accumulated profits would come into their hands and be available for the purpose of meeting such charges."

In fact, the debentures were all redeemed by the companies at various dates prior to the end of February, 1933, but the crucial date in the present question is the date of the issue of the debentures. The High Court decided against the claim of the Crown, holding that the case was governed by the principles laid down by the House of Lords in the cases of *Inland Revenue Commissioners* v. *Blott* (1) and *Inland Revenue Commissioners* v. *Fisher's Executors*. (2) They rejected an argument of the Advocate-General directed against the validity of the proceedings of the companies, upon the ground that it was not open on the case as stated by the Commissioner, which proceeds on the footing that the transactions of the companies are unimpeachable. This argument was not pressed at the hearing before their Lordships.

The question being whether, by the transactions in question, any income, profits or gains accrued or arose to or were received by the assessees within the meaning of s. 4 of the Indian Income-tax Act, the Crown maintained, first, that the decisions in the cases of *Blott* (1) and *Fisher* (2), which were under the Imperial Income Tax Act, were not applicable, and that the decision of this Board in *Swan Brewery Co., Ld.* v. *The King* (3) applied in the present case, and, secondly, that, in any event, the facts in the present case rendered it distinguishable from the cases of *Blott* (1) and *Fisher* (2), in respect that the purpose of the transactions in the present case was not a genuine company purpose, but for the individual benefit of the controlling shareholders.

In the first place, their Lordships are of opinion that, as regards the point here in issue, there is no ground for distinction between the Imperial Act and the Indian Act. In *Income-tax Commissioner* v. *Shaw, Wallace & Co.* (4) Sir George Lowndes, in delivering the judgment of the Board while expressing a general warning against treating questions under these Acts as in pari materia, said (1): "The object of the Indian Act is to tax 'income,' a term which it does not define. It is expanded, no doubt, into 'income, profits and gains,' but the expansion is more a matter of words than of substance." This states compendiously the same view as is expressed in regard to the Imperial Act by Lord Macnaghten in *London County Council* v. *Attorney-General.* (2)

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(1) [1921] 2 A. C. 171.

(2) [1926] A. C. 395.

(3) [1914] A. C. 231.

(4) (1932) L. R. 59 I. A. 206.

In the case of the *Swan Brewery Co.* (3) the company had passed resolutions by which its capital was increased by a new issue of shares, and a portion of the accumulated profits standing to the credit of the reserve fund corresponding to the amount payable on allotment of the shares was transferred to the credit of the share capital account, the new shares being then allotted as fully paid among the shareholders pro rata. It was held by the Board that these transactions were in effect a declaration of a dividend within the meaning of the Dividend Duties Act, 1902, of Western Australia, under s. 2 of which the word "dividend" was defined as including "every dividend, profit, advantage, or gain intended to be paid or credited to or distributed among the members of any company." In delivering the judgment of the Board, Lord Sumner, referring to the argument of the appellant company, said (4): "The duty claimed is not, it is said, a duty on or in proportion to any advantage either to the company or the shareholder measured by the increased stability of the company's own position or the increased facility to the shareholder in marketing his shares: it is measured by and is levied upon the whole nominal value of the new shares allotted, which is not the same thing as the value of the advantage distributed. Is this argument sound?

"Their Lordships agree with the Supreme Court of Western Australia in thinking that it is not. There can be no doubt that the new shares were distributed and were not the same things as the old ones. They certainly were supposed to be advantages to the members of the company, none the less that the making of the issue was probably an advantage to the company also. In so flourishing a business doubtless they really were advantages. The new shares were credited as fully paid, and, what is more, they were fully paid, for after the allotment the company held 101,450*l.* as capital produced by the issue of those shares and for that consideration, and no longer as an undivided part of its accumulated reserve fund. True, that in a sense it was all one transaction, but that is an ambiguous expression. In business, as in contemplation of law, there were two transactions, the creation and issue of new shares on the company's part, and on the allottees' part the satisfaction of the liability to pay for them by acquiescing in such a transfer from reserve to share capital as put an end to any participation in the sum of 101,450*l.* in right of the old shares, and created instead a right of general participation in the company's profits and assets in right of the new shares, without any further liability to make a cash contribution in respect of them. In the words of Parker C.J., 'Had the company distributed the 101,450*l.* among the shareholders and had the shareholders repaid such sums to the company as the price of the 81,160 new shares, the duty on the 101,450*l.* would clearly have been payable. Is not this virtually the effect of what was actually done? I think it is.' "

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(1) (1932) L. R. 59 I. A. 212.

(2) [1901] A. C. 26.

(3) [1914] A. C. 231.

(4) Ibid. 235.

It is unnecessary to resume in detail the facts in the cases of *Blott* (1) and *Fisher*. (2) In *Blott's* case (1) the company applied accumulated profits in satisfaction of the amount due on the issue of bonus shares, while in *Fisher's* case (2) accumulated profits were similarly applied in respect of bonus debentures. In the latter case Lord Cave states the principle of the decision in *Blott's* case (1) by quoting the opinion of Lord Haldane in that case, which was as follows (3): " My Lords, for the reasons I have given I think that it is, as matter of principle, within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether

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(1) [1921] 2 A. C. 171.

(2) [1926] A. C. 395.

(3) Ibid. 400.

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it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not distribute them at all, but apply them in paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute. If this is done, the money so applied is capital and never becomes profits in the hands of the shareholder at all. What the latter gets is no doubt a valuable thing. But it is a thing in the nature of an extra share certificate in the company."

The case of bonus debentures was held to be indistinguishable from that of bonus shares. Nor does it seem possible to distinguish the facts of the present case from those in *Fisher's* case (1), apart from the contention of the Crown that the real purpose of the transactions in the present case forms a relevant ground of distinction.

The case of the *Swan Brewery Co.* (2) was referred to in certain of the opinions in *Blott's* case. (3) Lord Haldane says (4): "There the transaction was in many respects analogous to that here. But the taxing statute was couched in very different language. . . . . There were expressions in the judgment which may be construed as having gone rather further, and treated the payment made by the company as equivalent in substance to a payment by the company to the shareholders, and by them back to the company. It may have been so, and without a fuller knowledge of the facts in the case and of the local law than the report discloses, it is difficult to be quite sure about the point, but what is clear is that the wide character of the word 'advantages' was a primary consideration in what was said by their Lordships who took part in advising His Majesty. I therefore do not feel embarrassed by the decision in that case."

Lord Finlay thought (5) that the reasoning in the *Swan Brewery Co.'s* case (2) was inconsistent with the decision of the House of Lords in *Bouch* v. *Sproule.* (6) Lord Cave (7) said that the decision in the *Swan Brewery Co.'s* case (2)

(1) [1926] A. C. 395.
(2) [1914] A. C. 231.
(3) [1921] 2 A. C. 171.
(4) Ibid. 188.
(5) Ibid. 199.
(6) 12 App. Cas. 385.
(7) [1921] 2 A. C. 202.

was no doubt fully supported by the definition clause in the Western Australia Act, but that, otherwise, he would hold it to be inconsistent with *Bouch* v. *Sproule*. (1) Lord Dunedin, who dissented in *Blott's* case (2), stated (3) that the *Swan Brewery Co.'s* case (4) was a decision upon an Australian statute in the words of which if anything became an "advantage" it would fall within the tax. Lord Sumner, who also dissented in *Blott's* case (2), and also delivered the judgment of the Board in the *Swan Brewery Co.'s* case (4), was clearly of opinion that (5) what was said by the Judicial Committee in the latter case as to the effect in law and in business of a distribution of bonus shares, was part of the decision, and could not be distinguished from *Blott's* case. (2)

Having carefully considered the judgment in the *Swan Brewery Co.*'s case (4), and the varying views taken of it in *Blott's* case (2), their Lordships are of opinion that the judgment must be regarded as having been primarily based on the distribution of the new shares being advantages within the meaning of the particular Act under consideration, while the further expression of opinion in the judgment rather regarded the transaction as involving, in substance, a distribution of accumulated profits among the shareholders and a repayment by them to the company, although the operation was in fact short-circuited. For the purpose of the present question, their Lordships are clearly of opinion that the decisions under the Imperial Income Tax Act are more relevant to the similar question under the Indian Income-tax Act, than a decision under the different terminology of the Western Australia Act.

Lastly, their Lordships are clearly of opinion that the personal motive or purpose of the individual shareholders, even if they hold a controlling interest in the company, is irrelevant, if it is made out that the company has in fact capitalized the accumulated profits. It is sufficient to quote from the opinion of Lord Sumner in *Fisher's* case (6), in the

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(1) 12 App. Cas. 385.
(2) [1921] 2 A. C. 171.
(3) Ibid. 203.
(4) [1914] A. C. 231.
(5) [1921] 2 A. C. 217.
(6) [1926] A. C. 395.

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decision of which he concurred, as follows (1): "In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention, that the company has, is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance. At any rate, in the present case, there is no need to distinguish between form and substance in the transaction itself or to refer to desires or intentions, further than to examine what was done, for everything was carried out in plain terms and without concealment. What the requisite majorities of the shareholders desired and intended is pretty plain too, but that is another matter."

Their Lordships are therefore of opinion that the first question of law referred by the Commissioner of Income-tax should be answered in the negative, that the judgment of the High Court should be affirmed, and that the appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondents: *Nye, Moreton & Clowes.*

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(1) [1926] A. C. 411, 412.

[PRIVY COUNCIL.]

PAYNE . . . . APPELLANT ;

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AND

DEPUTY FEDERAL COMMISSIONER OF TAXATION . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Revenue—Income tax—Income received in England—Not remitted to Australia—Assessment to Federal income tax—Rate of exchange—Assessable income to be expressed in terms of Australian currency—Method of calculation—Income Tax Assessment Act, 1922 (*No.* 37 *of* 1922), *as amended by No.* 50 *of* 1930, *ss.* 4, 13, 32, 35—*Income Tax Act,* 1931 (*No.* 24 *of* 1931), *ss.* 2, 3, 4, 6.

The appellant, resident in Australia, included in his Federal income tax return a sum of 5671*l.*, interest on British funded stock, which had been received by him by credits to his account with a bank in London and retained in England. The assessing officer added to the appellant's net income return a sum of 1097*l.*, representing the difference between the 5671*l.* and the sum which would have been produced in Australia at the then existing rate of exchange by telegraphic transfer upon the respective dates of credit of the sums constituting the 5671*l.* On a claim by the appellant that the sum of 5671*l.* should not be included in his return at any other figure than 5671*l.* :—

Held, that the Australian Income Tax Acts, which provide that the amount of income tax payable is to be ascertained by reference to a rate based on a calculation of pence per pound of taxable income, in referring to pounds and pence are referring only to those units of Australian currency known as pounds and pence. To calculate Australian income tax at a rate of so many pence per pound of taxable income the assessable income of the taxpayer must, whatever be the currency in which he derives it, all be expressed in terms of Australian currency. The appellant's derived income had, therefore, for the purposes of income tax, to be stated and dealt with in terms of Australian currency, and the 1097*l.* was rightly included in his assessment.

Adelaide Electric Supply Co. v. *Prudential Assurance Co.* [1934] A. C. 122, distinguished.

Judgment of the High Court of Australia (1934) 51 C. L. R. 197, affirmed.

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* *Present :* VISCOUNT HAILSHAM L.C., LORD RUSSELL OF KILLOWEN, LORD WRIGHT M.R., SIR ISAAC ISAACS, and SIR GEORGE RANKIN.

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APPEAL (No. 49 of 1935) from two judgments of the High Court of Australia, one by the Full Court (April 30, 1934) answering certain questions upon a case stated by Dixon J., and the other (May 9, 1934) by Dixon J. dismissing, pursuant to such answers, the appeal of the present appellant, Arthur Ernest Tyndall Payne, from his assessment for Federal income tax for the year 1931–32 under the Income Tax Assessment Act, 1922–31, and the Income Tax Act, 1931, of the Commonwealth of Australia.

The appellant, a resident in Melbourne, Victoria, returned his gross income for the purpose of Federal income tax at 20,173*l.*, and included therein the sum of 5671*l.* as interest on British funded stock, such sum having been received by him by credits to his account with the Union Bank of Australia, Ld., in London, and retained in England. From his gross income he claimed certain deductions, returning his net income at 14,831*l.* The assessing officer added to the total amount so returned a sum of 1097*l.*, representing the difference between the 5671*l.* and the sum which would have been produced in Melbourne at the then existing rate of exchange by the telegraphic transfer upon the respective dates of credit of the sums constituting the said 5671*l.* The appellant made objections claiming that the sum of 5671*l.* should not be included at any other figure. His objections were disallowed, and thereupon, under the provisions of the Commonwealth Income Tax Assessment Act, 1922–32, were treated as an appeal, and the matter was transmitted to the High Court of Australia for hearing.

The appeal came before Dixon J., who stated a case for the opinion of the Full Court of the High Court upon the following questions: 1.—(A) Was the Commissioner right in including in the said assessment or assessments the said amount of 1097*l.*; or (B) ought the Commissioner to have included no more, in respect of the interest aforesaid, than the sum of 5671*l.*; 2. If both the preceding questions are answered No, upon what basis ought the amount to be included in the appellant's assessment in respect of such interest to be ascertained?

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The judges of the High Court were divided in opinion. Gavan Duffy C.J., Evatt and McTiernan JJ. were of opinion that the assessment was correctly made and answered the questions accordingly. Rich, Starke and Dixon JJ. were of the contrary opinion. By virtue of s. 23 of the Commonwealth Judiciary Act the opinion of the Chief Justice prevailed, and by an order made by Dixon J., dated May 9, 1934, the appeal was dismissed. The appeal is reported at (1934) 51 C. L. R. 197.

1936. May 21. *Sir William Jowitt K.C.* and *J. H. Bowe* for the appellant. The appellant included in his return for the purposes of Federal income tax 5671*l.*, being the number of pounds which were paid into his bank account in London, and which were never in fact transmitted to Australia. The Australian Taxing Authorities say that owing to the difference in the rate of exchange between England and Australia at that time the 5671*l.*, if they had been transmitted to Australia, would have realized 6768*l.*, and that therefore the figure to be brought into the appellant's accounts for the purposes of income tax in Australia must be 6768*l.*—namely, the sum which he would have got in Australia in Australian currency.

This appeal is really concluded by the view taken by the House of Lords in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* (1), where the decision of the Court of Appeal was reversed and, inferentially, the opinion of Maugham J. (as he then was) in *Broken Hill Proprietary Co.* v. *Latham* (2) was restored. It is important to bear in mind two different conceptions: first, that the function of money is money of account, the measure by which things are measured; and secondly, the question of currency or legal tender must be borne in mind. Once that which has to be paid is measured that obligation must be discharged by whatever is legal tender in the country in which it has to be paid. Looked at from the point of view of money of account, the money of account at all material times was the same in Australia as it was in

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(1) [1934] A. C. 122.

(2) [1933] Ch. 373.

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England. That follows from the decision in the *Adelaide* case. (1) That being so, it must be assumed that the taxpayer received, and received only, 5671*l.*; but the tax he pays on that must be discharged in legal tender in Australia. [Reference was made to the following Australian statutes: Income Tax Act (No. 51 of 1930); Income Tax Act (No. 2), 1930 (No. 61 of 1930); Coinage Act (No. 6 of 1909); Commonwealth Bank Act (No. 43 of 1920); Commonwealth Bank Act (No. 31 of 1929); Commonwealth Bank Act (No. 16 of 1932); and Financial Emergency (State Legislation) Act (No. 11 of 1932).] Up to as late as May 21, 1932, anybody holding Australian notes had the right to call upon the bank to pay him a sovereign for every 1*l.* note. [Reference was also made to the following English Acts: Coinage Act, 1870 (33 Vict. c. 10); Currency and Bank Notes Act, 1914 (4 & 5 Geo. 5, c. 14); Gold Standard Act, 1925 (15 & 16 Geo. 5, c. 29); Currency and Bank Notes Act, 1928 (18 & 19 Geo. 5, c. 13); and Gold Standard (Amendment) Act, 1931 (21 & 22 Geo. 5, c. 46); and to the argument of Mr. Wilfrid Greene in the *Adelaide* case. (1)] The Australian sovereign was never minted except by a branch of the Royal Mint either at Sydney or Melbourne, and under and by virtue of the various Acts that sovereign minted in Australia was exactly the equivalent of the sovereign minted in London, and where the latter was legal tender so also was the former. Apart from the difference in design the two were absolutely and for all purposes interchangeable. [Reference was made to Feavearyear on The Pound Sterling, 1931, reprinted in 1932, where the difference between the pound as a unit of account, which has theoretically remained consistent, and the sovereign, or a different quantity of precious metal, or bullion, is plainly indicated.] *Broken Hill Proprietary Co.* v. *Latham* (2) was taken to the Court of Appeal and the view of the trial judge was not accepted; the judgments of the Court of Appeal were declared by the House of Lords in the *Adelaide* case (1) not to be correct. The *Adelaide* case (1) has plainly laid down the principle that, so far as the unit of account is concerned,

(1) [1934] A. C. 122, 127.

(2) [1933] Ch. 373.

the £ is the same in England and Australia. When it is sought to discharge an obligation it must be discharged by whatever is legal tender in the country wherever it falls to be discharged. But the extent and the nature of the obligation is measured in terms of the unit of account, and there is no difference in the unit of account between England and Australia. In the *Adelaide* case (1), on which my whole argument is based, Lord Warrington of Clyffe said (2): "I have come to the conclusion that, merely as a unit of account, the pound symbolized by the £ is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged." Lord Tomlin said (3): "There was no Australian pound as a unit or money of account distinct from the English pound." Lord Russell of Killowen said (4): "The pound in Australia was originally the same unit of account as the pound in England, not merely a unit of account with the same name, and . . . . it is impossible to say that any other or different unit of account has ever taken its place." And lastly, Lord Wright said (5): "I think it must be held in view of these facts that not only in a business sense, but in a legal sense, the currencies of England and Australia are and were at all material times different currencies, notwithstanding the identity of the unit of account."

Directly that money came into the appellant's bank account in England there was a source which rendered him liable to taxation. What had come in? 5671*l.* The only way it can be said that he is liable to pay tax on 6768*l.* is by going back from the determination in the *Adelaide* case (1) and saying that the unit of account is different. The appellant has received 5671*l.* in London, the unit of account is the same in Australia and England, and therefore he has received the same number of units of account in London and Australia. The Attorney-General for Australia says that notionally the appellant has received 6768*l.* in Australia, the appellant says actually I have received 5671*l.* in England, and the tax payable will be based on 5671*l.*, but the currency by which the tax obligation must be discharged will be Australian currency. It is wholly immaterial whether the money comes to Australia, the moment it is received in London the appellant's liability to tax in Australia attaches. The words of Lord Warrington in the *Adelaide* case (1) exactly puts my argument.

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(1) [1934] A. C. 122.
(2) Ibid. 138.
(3) Ibid. 142.
(4) [1934] A. C. 148.
(5) Ibid. 155.

The question must depend in the last resort on the true construction of the relevant Acts. The Income Tax Act, 1931, imposed the charge in respect of the particular year under consideration. This Act must be read with the Income Tax Assessment Act, 1922–31. The question is, was the appellant's return made under s. 32 of the Assessment Act, which included the 5671*l.*, a full, complete and accurate return ? Where an account is being rendered—and sending in a return is merely another phrase for that—in the very nature of things that account must be rendered in terms of units of account. It cannot be rendered in terms of currency, that means nothing. The method whereby the extent of the indebtedness is ascertained must be by units of account, although it is discharged by currency.

[LORD HAILSHAM L.C. Suppose the appellant had had the money remitted to Australia, and he had had to make a return of his total assessable income under s. 4 of the Assessment Act, would it have been a full and complete return to say that the gross income derived from all sources was only 5671*l.* ?]

Yes. The income tax attaches to the money the very second of time that it is received in London. What is done with it afterwards matters not, and whether it was or was not sent out to Australia is immaterial. Every statement in the return must be transferred to some common denominator, otherwise the totality cannot be arrived at. Is there in law or in the statutes any reason or theory which necessitates a notional transfer of the money from England to Australia ? The majority judgment of the High Court of Australia thinks that there is some justification for this notional transfer. There is nothing in the Act about notional transfers. If the money was in one common denominator there is no necessity for a notional transfer. The House of Lords in the *Adelaide* case (1) have said that the unit of account, the £, is the same in England and Australia : if that be right there is no justification whatever for a notional transfer. The appeal should be allowed.

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(1) [1934] A. C. 138.

Bowe followed. The High Court failed to draw the proper distinction between accounting and discharging. The problem being dealt with is one of accounting. The High Court said that " the Australian income tax system is only concerned with the real value, not with the theoretical basis of assessable income." That is a completely inaccurate statement in relation to any income tax enactments, and certainly in relation to the British and the Australian income tax law.

Menzies K.C., A.-G. for Australia, *Gavin Simonds K.C.*, and *Wilfrid Barton* for the respondent. The material portion of the Income Tax Act, 1931, which must be construed with the Income Tax Assessment Act, is to be found in the Second Schedule. The word " pound " appearing in the Schedule to an Australian Act of Parliament is prima facie a reference to the pound as understood in Australia. It is used as an indication of a measure of value when applied to the income to be taxed and the amount of tax to be paid in respect of that income. Further, prima facie where the word " pound " is used in the Schedule to the Income Tax Act it is designed to be used with a certain and non-fluctuating meaning. It is designed to indicate the same thing, and to denote the same measure of value throughout. It is quite clear that it may be said at one and the same time that a pound is a unit of account, as the name by which an obligation is stated, and is the same in the two countries, but at the same time that a pound as a measure of value in the two countries is quite distinct. What is being looked at in this Act is the value of the income, and the word " pound " is being used as indicating the measure of that value. Receipts are measured in the last resort in units of currency. For the purpose of making a return the money is to be considered as something which is a measure of value and a medium of exchange, and in that sense the facts in this case are conclusive to show that, treating money as a measure of value, there is an essential difference at the relevant time between the money of Great Britain and that of Australia, because measuring the value of the same thing in terms of each a different result is arrived at.

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(1) [1934] A.C. 122.

As a matter of ordinary statutory interpretation the view now submitted would plainly be correct. But it is said that the Board are constrained to do violence to that normal view by the *Adelaide* case. (1) Where in an Anglo-Australian contract there is an obligation to pay so many pounds, the word " pounds " is itself not conclusive of the matter. It is a word which, as a word, is appropriate to describe the obligation expressed in terms of English currency or Australian currency. It is a mutual term. It is equally appropriate to describe the unit existing in one country or the other. And in order to determine what actual obligation in terms of currency is imported the contract must be looked at to determine where the payment is to be made. If it is to be made in England, then it can be discharged only by legal tender recognizable in England : if it is payable in Australia, construing the contract according to the ordinary principles, then it can be discharged by what is recognized as legal tender in Australia. That is simply the clear decision of the House of Lords in the *Adelaide* case. (1) The true view of that case leaves completely untouched the principle that where there is a taxing Act affecting to operate on the income of Australian citizens it cannot be so construed that income tax will be estimated by a measure of value which is different in each of the two countries, as a measure of value. The *Adelaide* case (1) does not constrain this Board to any conclusion adverse to the opinion of the Commissioner of Taxes in this case ; and the *Adelaide* case (1) being out of the way, and the matter being regarded as free from authority, the conclusion is irresistible that the Commissioner was right, and that the appeal should be dismissed.

Gavin Simonds K.C. followed. The function of money is

(1) [1934] A. C. 122.

to be the medium of exchange and the measure of value, and that aspect of it must be insisted upon in attempting to determine what is the income of the taxpayer. What the Board decides in this case will also decide what is the income of a British taxpayer in respect of his Australian pounds received in Australia and not remitted to this country: it is beyond doubt that for the purpose of making his return the taxpayer converts what he receives in Australia into English pounds.

Sir William Jowitt K.C. replied. The *Adelaide* case (1) was not the case of an Anglo-Australian contract.

June 23. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. The facts relevant to this appeal are not in dispute. The appellant, a resident in Melbourne, Victoria, returned his gross income for the purpose of Federal income tax at 20,173*l.*, and included therein the sum of 5671*l.* as interest on British funded stock, such sum having been received by him by credits to his account with the Union Bank of Australia, Ld., in London, and retained in England. From his gross income he claimed certain deductions, returning his net income at 14,831*l.* The assessing officer added to the total amount so returned a sum of 1097*l.*, representing the difference between the said 5671*l.* and the sum which would have been produced in Melbourne by the telegraphic transfer upon the respective dates of credit of the sums constituting the said 5671*l.*

The appellant made objections claiming that the sum of 5671*l.* should not be included at any other figure. His objections were disallowed, and thereupon, under the provisions of the Commonwealth Income Tax Assessment Act, 1922–32, were treated as an appeal, and the matter was transmitted to the High Court of Australia for hearing.

The appeal came before Dixon J., who stated a case for the opinion of the Full Court of the High Court, setting out the facts and asking for the opinion of the Full Court upon the following questions:—

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" 1.—(A) Was the Commissioner right in including in the said assessment or assessments the said amount of 1097*l.*; or (B) ought the Commissioner to have included no more, in respect of the interest aforesaid, than the sum of 5671*l.*;

2. If both the preceding questions are answered NO, upon what basis ought the amount to be included in the appellant's assessment in respect of such interest to be ascertained ?

The judges of the High Court were divided in opinion as to the answers which should be given. Gavan Duffy C.J., and Evatt and McTiernan JJ. were of opinion that the assessment was correctly made, and answered the questions accordingly. Rich, Starke, and Dixon JJ. were of the contrary opinion, relying largely, as it appears to their Lordships, upon a decision of the House of Lords in the case of *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* (1) By virtue of s. 23 of the Commonwealth Judiciary Act the opinion of the Chief Justice prevailed, and by an order made by Dixon J. dated May 9, 1934, the appeal was dismissed.

Their Lordships are of opinion that the appeal was rightly dismissed. The question appears to them to depend upon the true meaning and construction of the Income Tax and Income Tax Assessment Acts of the Commonwealth of Australia. Liability to income tax in Australia is imposed by Acts of a permanent nature, called Income Tax Assessment Acts, supplemented by annual Acts, called Income Tax Acts, which fix, among other things, the rate and amount of the tax. In this case the return, the correctness of which was challenged, is dated September 18, 1931. The relevant Acts to be considered are the Income Tax Assessment Act, 1922 (No. 37 of 1922), as amended to 1931 (hereinafter called " the Assessment Act "), and the Income Tax Act, 1931 (No. 24 of 1931), which will be referred to as the Taxing Act, and which, by s. 2, provides that the Assessment Act " shall be incorporated with and read as one with this Act."

By the Assessment Act " assessable income " means in the case of a resident the gross income derived from all sources whether in Australia or elsewhere (No. 37 of 1922, as amended by s. 2 (*b*) of No. 50 of 1930), and " taxable income " means the amount of income remaining after all deductions allowed by the Act have been made. By s. 13 of the principal Act, amended by s. 4 (*a*) of No. 50 of 1930, the tax is to be levied and paid for each financial year upon the taxable income derived, directly or indirectly, by every resident from all sources, whether in Australia or elsewhere, during the period of twelve months ending on the thirtieth day of June preceding the financial year for which the tax is payable. By s. 32, as amended by s. 18 of No. 50 of 1930, there is imposed upon every resident (not being a company) whose total assessable income is not below specified sums, an obligation (which was binding on the appellant), when called upon by notice in the Gazette, to " furnish to the Commissioner in the prescribed manner a return setting forth a full and complete statement of the total assessable income derived by him during the financial year ending on the preceding 30th day of June." Sect. 35 of Act No. 37 of 1922 is in the following terms : " From the returns and from any other information in his possession, or from any one or more of these sources, the Commissioner shall cause assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied."

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It will be observed that the Assessment Act imposes upon the taxpayer the obligation of supplying the materials from which the Commissioner is to be able (with or without any other information in his possession) to discharge his duty of assessing the taxpayer in an amount of taxable income " upon which income tax shall be levied."

Turning now to the Taxing Act, the tax is imposed by ss. 3 and 6. Sect. 3 provides that income tax is imposed at the declared rates. Sect. 6 provides that it shall be levied and paid for the financial year beginning on July 1, 1931. The rates are declared by s. 4 to be the different rates in respect of the different kinds of income respectively set out in the nine Schedules to the Act. In every case the amount payable is ascertained by reference to a rate based on a calculation of pence per pound. It will be sufficient to refer to the Second

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Schedule, which is the Schedule relevant to the said 5671*l.* It runs thus :—

SECOND SCHEDULE.

RATE OF TAX UPON INCOME DERIVED FROM PROPERTY.

For the purposes of this Schedule— T = taxable income in pounds.

If the taxable income does not exceed 500*l.*, the rate of tax for every pound of taxable income shall be	$\left\{ 3 + \frac{T}{100} \right\}$ pence.
If the taxable income exceeds 500*l.* but does not exceed 1500*l.*, the rate of tax for every pound of taxable income shall be . .	$\left\{ 1 + \frac{T \times 14}{1000} \right\}$ pence.
If the taxable income exceeds 1500*l.* but does not exceed 3700*l.*, the rate of tax for every pound of taxable income shall be .	$\left\{ 4\frac{3}{4} + \frac{T \times 23}{2000} \right\}$ pence.
If the taxable income exceeds 3700*l.*, the rate of tax for every pound of taxable income up to and including 3700*l.* shall be and	$\left\{ 4\frac{3}{4} + \frac{3700 \times 23}{2000} \right\}$ pence.
the rate of tax for every pound of taxable income in excess of 3700*l.* shall be . .	90 pence.

There can be no manner of doubt that these Australian Acts, in referring to pounds and pence, are referring to those units of Australian currency known as pounds and pence respectively, and to nothing else. The income tax payable by a taxpayer to the Australian revenue is to be fixed by means of a calculation which involves the multiplication of an ascertained number of one kind of units of Australian currency by the scheduled number of another kind of units of Australian currency, the product being the resultant number of Australian pence. It seems necessarily to follow that to enable this calculation to be made, the assessable income of the taxpayer must, whatever be the currency in which he derives it, all be expressed in terms of Australian currency ; in other words if any portion of his assessable income is derived by him in French or Belgian currency, it must, before he can be properly assessed to Australian income tax, be converted into its equivalent, at the time it was derived, in Australian currency. In exactly the same way, any income derived by him in British currency must be converted into its equivalent in Australian currency. In short, when an

Australian statute tells the taxpayer to state his derived income in order that a fraction thereof (i.e., so many pence in the pound of derived income) may be taken as tax, this can only mean that his derived income is to be stated and dealt with in terms of Australian currency. From this it would accordingly follow that the Commissioner was right in including the amount of 1097*l.* in the appellant's assessment.

It was, however, contended that a recent decision in the House of Lords was inconsistent with this view, and was conclusive in the appellant's favour on the present appeal. Their Lordships are unable to agree with this contention. The case referred to is *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* (1) The actual decision related to a matter very far removed from the question now under consideration. The actual decision was this: That an obligation to pay a preference dividend of (say) 5*l.*, which was originally payable in England, but which by an alteration of the company's articles, binding on the preference stockholder, had been made payable only in Australia, was effectively discharged by a payment in Australian currency although the stockholder in England received, owing to the rate of exchange, less than 5*l.* in English currency.

Their Lordships can see nothing in that decision inconsistent with the view that for the purpose of assessing an Australian taxpayer to income tax under the Australian revenue legislation, it is necessary that his assessable income should be expressed in terms of Australian currency. It was said, however, that some of the Lords who took part in the debate on the *Adelaide* case (1), expressed a view which entitled the appellant to say that the 5671*l.* which he derived in England in British currency should figure in his income tax return, though made in terms of Australian currency, at the same figure and no more. The view in question is a view expressed in terms by three of the noble Lords—namely, that the unit of account symbolized by the £ and originally carried by the early settlers from England to Australia had never been changed, but had remained the same as a measure of obligation,

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though the discharge of the obligation so measured might be affected by fluctuations in the currency which was legal tender in loco solutionis.

Their Lordships are unable to see anything in the views so expressed which would justify, still less necessitate, a construction of the Assessment Act and the Taxing Act other than that which they have indicated above—namely, that in order to calculate Australian income tax at a rate of so many pence per pound of "taxable income," it is essential that the "assessable income" should be expressed in terms of Australian currency.

For the reasons which they have indicated, their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Burton, Yeates & Hart.*
Solicitors for respondent: *Coward, Chance & Co.*

1948] 1 K. B. 562
bservations of Lord Russell of
illowen, at p. 533, *applied*. John
aing & Son, Ltd. *v.* Kingswood
ss. Com. [1948] 1 All E.R. 943.

Applied. John Laing, Ld. *v.* Assessment, Etc. **[1948] 2 K. B. 116**

Dicta of Lord Russell of Killowen, at p. 529, *applied*. Helman *v.* Horsham and Worthing Ass. Com. [1949] 1 All E.R. 776.

Applied. Helman *v.* Horsham, Etc. Cttee. **[1949] 2 K. B. 335**

Applied. John Laing *v.* Assessment, etc. **[1949] 1 K. B. 344**

H. L. (E.)*

1936
May 20.

HOUSE OF LORDS.

MAYOR, ALDERMEN AND COUNCILLORS OF THE CITY OF WESTMINSTER . . . . Appellants;

AND

THE SOUTHERN RAILWAY COMPANY, THE RAILWAY ASSESSMENT AUTHORITY AND W. H. SMITH AND SON, LIMITED . . Respondents.

MAYOR, ALDERMEN AND COUNCILLORS OF THE CITY OF WESTMINSTER AND THE VALUATION COMMITTEE FOR THE COUNTY OF KENT . . . . . Appellants;

AND

THE SOUTHERN RAILWAY COMPANY, THE RAILWAY ASSESSMENT AUTHORITY AND THE PULLMAN CAR COMPANY, LIMITED . . . . Respondents.

Rates and Rating—Railway station—Tenements let under leases or licences—Bookstalls, kiosks, show-cases, etc.—Railway hereditaments—Separate assessments—Advertising Stations (Rating) Act, 1889 (52 & 53 *Vict. c.* 27), *s.* 3—*Railways (Valuation for Rating) Act,* 1930 (20 & 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3.

Bookstalls, chemist's shop, kiosks, hairdressing saloons and other tenements within the area of a railway station:—

Held (by Lord Russell of Killowen, Lord Macmillan and Lord Wright), to have been "so let out as to be capable of separate assessment" within the proviso to s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930, and therefore not to be "railway hereditaments" within s. 1, sub-s. 3, but to be rateable under the general law of rating.

Smith v. *Lambeth Assessment Committee* (1882) 10 Q. B. D. 327 overruled.

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* *Present:* Lord Russell of Killowen, Lord Macmillan, and Lord Wright.

London & North Western Ry. Co. v. *Buckmaster* (1875) L. R. 10 Q. B. 70, 444, disapproved.

Cory v. *Bristow* (1877) 2 App. Cas. 262; *Holywell Union* v. *Halkyn District Mines Drainage Co.* [1895] A. C. 117; and *Young* v. *Liverpool Assessment Committee* [1911] 2 K. B. 195, approved.

Decisions of the Railway and Canal Commission reversed.

Show-cases *held* by Lord Macmillan and Lord Wright (Lord Russell of Killowen contra) not to be "used for the exhibition of advertisements" within s. 3 of the Advertising Stations (Rating) Act, 1889, and accordingly to be rateable under the general law and not under that section.

CONSOLIDATED APPEALS from two orders of the Railway and Canal Commission, both dated April 15, 1935.

In the first appeal the Railway Assessment Authority had included in the First Valuation Roll certain premises at Victoria Station as being "railway hereditaments" within the City of Westminster, being hereditaments "occupied for the purposes of the undertaking" of the Southern Railway Company within the meaning of s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930. The Mayor, Aldermen and Councillors of the City of Westminster, hereinafter called the Westminster Council, appealed against the First Valuation Roll. The Railway Assessment Authority and Messrs. W. H. Smith & Son, Ld., appeared with the Southern Railway Company as respondents to that appeal. The Railway and Canal Commission dismissed the appeal.

The Westminster Council appealed to this House.

In the second appeal the Railway Assessment Authority had treated certain premises at Victoria Station and at Beckenham Junction as not being parts of the railway hereditament occupied for the purposes of the undertaking of the Southern Railway Company within the meaning of the enactment mentioned above. The Southern Railway Company appealed. The Railway Assessment Authority, the Westminster Council, and the Kent Valuation Committee appeared as respondents to that appeal. The Railway and Canal Commission allowed the appeal.

The Westminster Council and the Kent Valuation Committee appealed to this House.

The Station Yard at Victoria Station is not enclosed within gates, but is at all times open to the public. Access to the main station is obtained by gates in Wilton Road, Hudson's Place, and Buckingham Palace Road, as well as by gates opening on to the Station Yard. There are also gates to the Passenger Gallery at Eccleston Bridge, which is used as an exit for passengers.

These gates are closed by the Southern Railway Company's servants at 12.45 A.M. every night and reopened by them at 4.30 A.M. for a short time, and then closed again until 6 A.M. All the premises the subject of these appeals, are within the main Station, and, when the gates are closed, no one can get access to them but by leave of the Company. The shops and kiosks hereinafter mentioned open at about 8 A.M. and close at about 10 P.M. Purchasers frequenting them include persons other than passengers by the railway.

The structures and premises may be roughly divided into three groups:

I. (*a*) Premises of a permanent character not forming part of the building which is used by the Railway Company for its own purposes. Examples of these are a branch of the National Provincial Bank, shops belonging to Messrs. Boots and others, and a tobacco stall.

(*b*) Premises forming part of a building used by the Company for its own purposes. Examples of these are the offices of the Pullman Car Company and one of the kiosks.

II. Bookstalls and kiosks or small shops apparently resting on the floor of the Station by their own weight, but connected by pipes and electrical connections provided by the Company with parts of the Station.

III. Show-cases containing goods exposed for the purpose of advertisement. Two of these rested on the floor of the Station; one was connected with the walls by brackets; and one formed part of one of the main walls of the Station.

Each of the premises was the subject of an agreement in writing between the Company and another party, called in some cases a tenant and in others a licensee, under which he was given the right or the permission to use the premises for the purposes of his business. In all of these agreements certain rights were reserved to the Company. Few of them were in exactly similar terms. They may be divided into: (1.) Agreements in the form of demises; (2.) Agreements in the form of licences. In either case the tenant or licensee agreed to pay a yearly sum free of all deductions except property tax, rates and taxes, to keep the premises in repair, and to permit the Company at all reasonable times to enter upon the premises to view the state and condition thereof; to obey the by-laws and regulations of the Company with respect to the regulation and management of their premises; not to make alterations, additions or improvements, and not to assign or part with possession of the premises or any part thereof. They also contained a proviso for re-entry. Agreements in the form of licences contained a clause by which it was declared that the agreement "does not operate as a demise or constitute any holding or contract of tenancy of the Company's property but shall confer on the licensees only a right to enter thereon for the purpose of exercising the licence and permission hereby given." The periods of user varied from twenty-one years determinable at three or six months' notice to holdings from year to year terminable on due notice at any time.

IV. W. H. Smith & Son's Agreement. This agreement covers four other cases. It was dated September 11, 1929, and was made between W. H. Smith & Son, Ld., the licensees to whom the Company gave the sole and exclusive licences and privileges therein mentioned including (1.) the sole and exclusive licence and privilege to sell (but only from the bookstalls and trolleys therein mentioned) newspapers, books and other articles approved by the Company's general manager "at all or any of the stations of the Company for the time being on their lines of railway":

(2.) Licence and liberty to erect on the platforms of the Company's stations such book-stalls, counters and the like as might be necessary subject to the approval of the general manager, who was empowered from time to time to order the removal of any book-stall to another site within a station; and also licence and liberty to use trolleys for the sale of books.

(3.) All necessary access, egress and ingress for the licensees and their servants, bona fide customers and subscribers, and agents, subject to the Company's by-laws and regulations, at all proper and reasonable times.

By clause 6 it was agreed that all persons employed by the licensees should while on the Company's premises be under the control of the general manager, and any such person who should misconduct himself at any of the stations (of which the general manager should be the sole judge) should be removed by the licensees and in default thereof by the Company.

By clause 10 the licensees were to provide bookstalls and to conduct them in a proper manner to the satisfaction of the Company, and to provide a sufficient supply of newspapers, journals and books. By clause 10 (*c*) the licensees' servants were to observe the Company's by-laws, rules and regulations; the licensees were not to retain any employee removed by the decision of the general manager, and their servants were not to obstruct the Company's servants and were to conform to the Company's reasonable orders. By clause 11 the general manager was empowered to forbid the sale of any objectionable books or other publications. By clause 12 the licensees were precluded from assigning the benefit of the agreement. By clause 14 the licensees were to keep the bookstalls in good repair. By clause 20 the Company was empowered to distrain if the licensees' payments were fourteen days in arrear. Clause 28 provided that "this agreement shall be deemed and shall operate as a licence only and not as a demise or lease or tenancy."

V. A miscellaneous group containing (1.) a tea-room, the subject of an agreement in the form of a licence for a term of years with undertakings by the licensees to pay rates, to repair, and to carry on and manage the tea-rooms to the satisfaction of the general manager, and not to assign or part with the possession of the premises:

(2.) A Post Office held under a tenancy at a rent and used as a shelter and temporary deposit of mails to which the Postmaster-General's servants had access over such parts of the station as the Company's engineer might prescribe and at such times only as the station was open for passenger traffic. The Company kept the premises in repair. The Postmaster-General paid the rates imposed upon them. The agreement contained a stipulation for quiet enjoyment:

(3.) An office of the Travellers Insurance Association, Ld., held under an agreement of tenancy whereby the tenants promised to pay rent and rates, to repair, to obey the Company's by-laws and not to underlet or part with possession. The Company had power to close the premises temporarily or permanently or to remove them to another part of the station if necessary for the purposes of their railway, and to close the station when not in use for passenger traffic or during such other times as the Company might consider necessary. The agreement contained a stipulation for quiet enjoyment:

(4.) Gentlemen's and Ladies' Hairdressing Saloons, of which the former was in the form of a tenancy agreement and the latter in that of a licence. No limitation was imposed upon the right or permission of access to either of these premises.

VI. Show-cases. These, with one immaterial exception, were held under agreements in the form of a signed application for leave to exhibit the object at an undefined site on the floor of the Station upon payment of a yearly sum and subject to conditions under which the approval of all advertisements exhibited lay with the Company, and the right to remove those of which they did not approve subject to an abatement of the rent, and to terminate the agreement by seven days' notice in writing.

The Goods Yard at Beckenham Junction was close to the Station and was entered by a gate opening to Station Approach Road. The gate was under the control of the Company and was locked every night between 8.30 P.M. and 6 A.M., and on Sundays. During these hours access could only be obtained by permission of the Company's servants, but permission was always given in fact to the tenants or licensees of premises the subject of this appeal.

These premises consisted of (*a*) buildings of a permanent character with raised stacking grounds or storage bays alongside and were occupied by builders' merchants. The buildings were used as offices and store rooms. Part of one building was used as a show-room. There was also a stacking ground with a concrete retaining wall and two bays for sand and building materials. Each of the premises was in possession of a tenant or licensee under an agreement in the form of a licence, by which the Company in consideration of the payment by the licensee to the Company of a specified sum quarterly agreed to grant to the licensee a licence to use the premises described in a Schedule as a depot for the purposes specified and for no other purpose, and the Company and the licensee agreed that the conditions annexed should be the terms of the licence and that each of them would abide by and perform those conditions. The principal conditions were:

(1.) that the licence might be determined by a three months' notice or, in certain circumstances, by the Company at shorter notice;

(2.) that the licensees should pay (*a*) a specified quarterly sum, (*b*) if the premises were separately assessed, all rates and charges, or, if the premises were not separately assessed a proportion of the rates charged on the Company, and (*c*) all charges for gas, electricity, water and other services supplied to them by the Company. The payments of the quarterly sum were to be recovered by distress and sale as if rent were in arrear under a demise;

(3.) that the Company should have free entrance and access to the premises for all purposes and at all times;

(4.) that the licensees should not . . . . (*c*) use or allow the premises to be used except as a depot for the goods of the description mentioned in the agreement conveyed or to be conveyed over the Company's system;

(5.) that the licensees should not without the consent of the Stationmaster or Goods Agent go or remain upon the premises or goods yard at any time when the yard is not open for business;

(6.) That the licensees should comply with the by-laws and regulations of local authorities and with the regulations of the Company and the directions of their officials with respect to the user of the premises and of the station and yard.

(7.) That the licensees should keep the premises in good and clean order and repair. . . . .

(10.) That the Company should have a general lien upon any property brought or sent to or stored upon the premises. . . . .

(12.) That the licensees should consign all traffic forwarded by them from the premises by the Company's railway whenever possible and should so far as practicable order all traffic forwarded to the said premises to be sent by the Company's railway vehicles or vessels provided that the Company's charges should not exceed those charged for similar traffic carried by similar methods of transport over any other route between the same places.

(13.) That this licence and agreement should not operate as a demise or create any tenancy of the premises and should confer on the licensees only a right to enter thereon for the purpose of exercising the licence and privilege granted.

1936. Feb. 24. *Comyns Carr K.C.* and *Michael Rowe* for the Westminster City Council. Each of the premises the subject of this appeal ought to be separately assessed. None of them is in fact a "railway hereditament," for none of them is "occupied for the purposes of the undertaking of a railway company" within the meaning of s. 3, sub-s. 1, of the Railways (Valuation for Rating) Act, 1930. MacKinnon J. untrammelled by authority would have come to that conclusion, but he considered himself bound by *Smith* v. *Lambeth Assessment Committee* (1), where one of Messrs. W. H. Smith & Son's bookstalls at Waterloo Station was under consideration, and it was held by the Court of Appeal that the London & South Western Railway were the occupiers and rateable in respect of it. It is submitted that this decision is inconsistent with *Cory* v. *Bristow* (2) and *Holywell Union* v. *Halkyn District Mines Drainage Co.* (3); that it was wrongly decided, and that it ought to be overruled. This is a very important point in this appeal, because the agreement upon which Messrs. W. H. Smith & Son held the book-stall in *Smith* v. *Lambeth Assessment Committee* (1) does not materially differ from that upon which their successors hold the bookstall at Victoria Station in the present case.

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(1) 10 Q. B. D. 327.

(2) (1875) L. R. 10 C. P. 504; (1875) 1 C. P. D. 54; (1877) 2 App. Cas. 262.

(3) [1895] A. C. 117.

The question is what constitutes rateable occupation?

"Where any part of the soil is permanently occupied by any body for profitable purposes . . . . then the person so occupying is rateable in respect of such occupation; but when a person has a mere right to use the land in the nature of an easement, which does not amount to occupation, and the occupation remains in somebody else, as for example, in the case of a lodger where the occupation remains in the lodging-house keeper, then such person is not liable to be rated": *Cory* v. *Bristow* (2), per James L.J.

Of the numerous cases cited to the Railway and Canal Commission in some the facts bring the case very close to the dividing line, and the final decision depends upon the inference which the Court drew from the facts. Of this class *Rochdale Canal Co.* v. *Brewster* (3) is an example. There it was held that the occupier of a berth in a dock was not in rateable occupation, but that the owners of the dock were rateable. On the other side of the line is *Young* v. *Liverpool Assessment Committee* (4), where it was held that the lessee of quay space in a dock was in rateable occupation and that the owners of the dock were not. Another such case is *London and North Western Ry. Co.* v. *Buckmaster* (5), where the railway company had given another company a right to put their horses in a stable belonging to the railway company, and it was held by six judges to three that the railway company was rateable.

Rateable occupation exists whenever a person is in actual possession of a defined piece of land and has the beneficial and exclusive use of it and of any structures upon it for purposes for which the land and structures are intended. The fact that the owner of the land has retained certain rights for purposes of his own which, though paramount in other respects, are subsidiary in relation to the user for which the particular premises are occupied, does not prevent the occupier from being in rateable occupation. Besides the contract and its terms two very important matters have to be considered: (1.) the nature of the building and the user of it, and (2.) the purpose for which the tenant or licensee is in possession of it: per Hamilton J., *Young* v. *Liverpool Assessment Committee.* (1)

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(1) 10 Q. B. D. 327.
(2) 1 C. P. D. 54, 55.
(3) [1894] 2 Q. B. 852.
(4) [1911] 2 K. B. 195.
(5) L. R. 10 Q. B. 70, 444, in Cam. Scacc.

The following cases were cited: *Rex* v. *St. Martin's-in-the-Fields* (2); *Smith* v. *St. Michael, Cambridge Overseers* (3); *Reg.* v. *St. George's Assessment Committee* (4); *Sutton Harbour Co.* v. *Plymouth Gardens* (5); *Percy* v. *Hall* (6); *Curzon* v. *Westminster Corporation* (7); *Electric Telegraph Co.* v. *Salford Overseers* (8); *Lancashire and Cheshire Telephone Exchange Co.* v. *Manchester Overseers.* (9)

1936. Feb. 28. *Hon. Sir Stafford Cripps K.C.* and *Erskine Simes* for the Railway Assessment Authority. At the date of the Valuation Roll these appellants were bound by the decision in *Smith* v. *Lambeth Assessment Committee* (10) and had no option but to include the premises in question as being "hereditaments occupied for the purposes of the undertaking" of the Southern Railway Company. That does not mean or imply that they are satisfied with that decision, and they submit the following contention for the consideration of the House. To come within s. 1, sub-s. 3, of the Act of 1930 it is not necessary that the hereditament should be occupied by the railway company. It may be occupied by someone else provided it is so occupied for the purposes of the undertaking of a railway company. For example, collection and delivery of goods is part of the undertaking of a railway company; and if the Southern Railway gave a lease or a licence of part of their

(1) [1911] 2 K. B. 195.
(2) (1842) 3 Q. B. 204.
(3) (1860) 3 E. & E. 383.
(4) (1871) L. R. 7 Q. B. 90.
(5) (1890) 55 J. P. 232.
(6) (1903) 67 J. P. 293.
(7) (1916) 80 J. P. 468.
(8) (1855) 11 Ex. 181.
(9) (1884) 13 Q. B. D. 700; 14 Q. B. D 269.
(10) 10 Q. B. D. 327.

station to Messrs. Carter, Paterson & Co., finding it more convenient to employ others to do the collecting and delivering of parcels than to do it themselves, the part of the station so occupied might well be "occupied for the purposes of the undertaking of a railway company." Again it may be part of the undertaking of a railway to provide facilities for obtaining newspapers, tobacco, chemicals, refreshments, and so forth. But a clear distinction must be drawn between providing facilities for obtaining these articles and providing the articles themselves. It is no part of the undertaking of a railway to supply the articles themselves, and accordingly these bookstalls kiosks, show-cases, hair-dressing saloons, chemists' shops, and so forth are not occupied by the railway company or any one else "for the purposes of the undertaking of a railway company."

Secondly, s. 1, sub-s. 3, contains the proviso: "No premises . . . . so let out as to be capable of separate assessment shall be deemed to be, or to form part of, a railway hereditament."

The words "capable of separate assessment" mean physically capable of being assessed and placed upon the valuation roll by the Assessment Authority. They have no relation to the judicial decisions for the time being upon the law of rating. It is plain that any and all of these premises can be so dealt with. They are identifiable and can be occupied.

With regard to the premises at Beckenham Junction, some of these, namely those used for storing goods which come by rail or are about to be sent by rail, are "occupied for the purposes of the undertaking of a railway company," and are therefore prima facie railway hereditaments. Then the question arises whether these premises are "so let out as to be capable of separate assessment," in which case they would be excluded from the class of railway hereditaments. There seems to be no reason for saying that they are incapable of such assessment.

North British Ry. Co. v. *Greig and Mackay* (1) was referred to.

(1) (1866) 4 M. 645.

1936. Feb. 28. *W. E. Tyldesley Jones K.C.*, *W. T. Monckton K.C.*, *A. M. Trustram Eve K.C.* and *Alfred Tylor* for the respondents, the Southern Railway Company. The question is whether Victoria Station is one hereditament or a group of several hereditaments. The answer is that it is one hereditament, and one only. W. H. Smith & Son's bookstall and Boots' Chemist's shop are placed on the surface of the station. The station exists for the purposes of the undertaking of the Railway Company and the Company has no more right to part with any portion of the station than the defendants in *Mulliner* v. *Midland Ry. Co.* (1) had to part with land under the arches upon which part of their station was built. They can only part with the surface of their station for the purposes of their undertaking. If W. H. Smith & Son's bookstall were removed to-morrow by whom but the Railway Company would the site be occupied? It follows that when under the power conferred by s. 91 of the Southern Railway Act, 1924, the Company "build" or "fit up shops, ... offices or any other similar buildings" those shops and offices become part of the undertaking of the Company, and in so far as their user is not inconsistent with the purposes for which a railway company is constituted, they may let part of their station on short tenancies which do not interfere with the purposes of the statutory undertaking. "It is familiar to us all that coal stores and bookstalls, and a great variety of things may be set up by railway companies which, although not actually used in the business of carrying passengers and goods, are nevertheless things which they may do, and yet carry on their own particular business quite consistently": per Lord Halsbury L.C., *Foster* v. *London Chatham & Dover Ry. Co.* (2) Among things which they may so do is to supply newspapers. The distinction drawn by the Railway Assessment Committee between supplying space for the sale of newspapers and selling the newspapers themselves is too fine to be substantial. Is it to be said that to attach a restaurant car to a train is within the powers of a railway company, but to supply wine, spirits, or beer, or aerated waters to passengers in the restaurant car is beyond their powers? The truth is that these bookstalls, kiosks, hair-dressing saloons, and other hereditaments are "occupied for the purposes of the Railway Company" within the meaning of s. 1, sub-s. 3, of the Act of 1930, which provides that "'railway hereditament' means any hereditament occupied for the purposes of the undertaking of a railway company; and 'undertaking' includes . . . . (*b*) any subsidiary or ancillary undertaking carried on by the Company." The supply of newspapers and books may be a subsidiary or ancillary undertaking of the Company. If it is, a hereditament occupied for that purpose is a railway hereditament.

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(1) (1879) 11 Ch. D. 611.

(2) [1895] 1 Q. B. 711, 718.

Then is the hereditament "so let out as to be capable of separate assessment"? It is not. *Smith* v. *Lambeth Assessment Committee* (1) decides that question. That case was decided nearly fifty years ago; it has been followed in Scotland in *Callender* v. *Oban* (2), and in Ireland in *David Allen & Sons* v. *King* (3), and has never before this case been questioned in England. A decision of this standing will not be overruled in this House: *Davidson* v. *Sinclair* (4); *Kirby* v. *Hunslet Assessment Committee* (5), unless indeed the principle of the case which is impugned is unworkable and leads to injustice: *West Kent Main Sewerage Board* v. *Dartford Union Assessment Committee* (6); of which there is no suggestion in the present case. It is argued that with *Holywell Union* v. *Halkyn District Mines Drainage Co.* (7) a new era opened in the law of rating. In truth that case created no new law. A mere easement which does not require occupation for its enjoyment does not attain to the standing of a rateable hereditament; that is well settled. The question arises when two persons are in competition each having sufficient possession, in the absence of the other, to warrant the inference that he is in occupation. In that state of facts he who has the predominant occupation is in occupation for rating purposes. The case of the landlord

(1) 10 Q. B. D. 327.
(2) (1888) 15 R. 634.
(3) [1915] 2 I. R. 213.
(4) (1878) 3 App. Cas. 765, 788.
(5) [1906] A. C. 43, 47.
(6) [1911] A. C. 171.
(7) [1895] A. C. 117.

and the lodger is an example, and is cited as an example by Lord Herschell in *Holywell Union* v. *Halkyn District Mines Drainage Co.* (1)

[Among other cases cited were: *Reg.* v. *St. George's Union* (2); *Allan* v. *Overseers of Liverpool* (3); *London & North Western Ry. Co.* v. *Buckmaster* (4); *Rochdale Canal Co.* v. *Brewster* (5); *Young & Co.* v. *Liverpool Assessment Committee.* (6)]

1936. March 5. *R. M. Montgomery K.C.*, *Gavin T. Simonds K.C.* and *Arthur Capewell* for W. H. Smith & Son, Ld.

The material cases to be considered fall into two classes, and the presence or absence of certain facts determines whether a particular case is to be attributed to one or to the other class. One of these classes is what may be called the lodger class. There one man is in occupation of a hereditament of part of which, and within the curtilage of which, he allows another to have certain contractual rights. The question which arises in doubtful cases is, has a new, a second and independent, hereditament been carved out of the original hereditament. If no, then the person found in the part of the original hereditament is a true lodger; if yes, then that person is not a lodger but may have a separate occupation in respect of which he is rateable. By way of example, take a hotel in the hall or lounge of which a show-case is placed with none but a limited right of access to its owner. That is an example of a holding which falls within the lodger class. Another example would be that of a tailor who is permitted to use a room in a hotel as a fitting-room for some of his customers, the hotel-keeper having entire control of the door of the hotel. In cases of this class the landlord may allow the lodger to have a key of the front door, but that does not detract from the landlord's control of the whole house; but in an ordinary case the control of access to the premises is a most important fact pointing to the conclusion that the landlord or the railway company, as the case may be, is the rateable occupier of the whole hereditament. Moreover if, according to the test proposed, a man is a lodger, the length of his sojourn is ineffective to convert him into a rateable occupier. It may be added that apartments used for other than domestic purposes may be lodgings and the users of them lodgers for this purpose: *Smith* v. *St. Michael, Cambridge Overseers.* (1)

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(1) [1895] A. C. 117, 126.
(2) L. R. 7 Q. B. 90.
(3) (1874) L. R. 9 Q. B. 180.
(4) L. R. 10 Q. B. 70, 444.
(5) [1894] 2 Q. B. 852.
(6) [1911] 2 K. B. 195.

But where a second and independent hereditament has been carved out of an original and larger tenement, there the occupier of the second and independent hereditament is not a lodger, but is a rateable occupier.

Now *Smith* v. *Lambeth Assessment Committee* (2) was a case of the lodger class. But *Holywell Union* v. *Halkyn District Mines Drainage Co.* (3) was a case of an independent hereditament the occupier of which was in rateable occupation. This is clear from the judgment of Collins J. in the Divisional Court (4), which was overruled in the Court of Appeal (5), but restored and affirmed in this House. (3) "There is," said the learned judge, "no dispute in point of law between the parties. In order to show that the subject matter in this case is rateable, it must be proved that there is exclusive occupation. The whole question in this case therefore is, whether or not there is exclusive occupation by the appellants of the tunnel and cutting through which the water from the mines is carried off. I think, when the terms of the grant and the terms of the exception are looked at, that the appellants have more than a mere right of passage through or access to the tunnel."

How then can it be said that *Smith* v. *Lambeth Assessment Committee* (2), a case of the lodger class, is inconsistent with *Holywell Union* v. *Halkyn District Mines Drainage Co.* (3), a case of rateable occupation? The two cases are in different classes. In *Smith's* case (2) the occupants could be moved from one part of the hereditament to the other, and the railway company had control of the entrance to the station. In the *Holywell Union* case (1) the Halkyn District Mines Drainage Co. were immovable, and the landowner had no control whatever over them.

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(1) 3 E. & E. 383.

(2) 9 Q. B. D. 585; 10 Q. B. D. 327.

(3) [1895] A. C. 117.

(4) (1893) 69 L. T. 112.

(5) (1894) 69 L. T. 705.

It is submitted that the following cases make the position clear: *Rex* v. *Eyles* (2); *Reg.* v. *St. Mary Abbot's* (3); *Smith* v. *St. Michael, Cambridge Overseers* (4); *Reg.* v. *St. George's Union* (5); *London & North Western Ry. Co.* v. *Buckmaster* (6); *Smith* v. *Lambeth Union* (7); *Rochdale Canal Co.* v. *Brewster* (8); *Young* v. *Liverpool Assessment Committee* (9); *Cleveland Bridge Co.* v. *Darlington Union* (10).

Considering the length of time during which *Smith* v. *Lambeth Assessment Committee* (7) and *London & North Western Railway Co.* v. *Buckmaster* (6) have stood for law and that since those decisions rating Acts have been passed dealing with hereditaments which may or may not be "so let out as to be separately rateable," with the knowledge that W. H. Smith & Son's bookstalls had been held not to be so let out, the Legislature must be taken to have stereotyped the law as it was laid down in those cases.

1936. March 6. *Comyns Carr K.C.* replied.

The House took time for consideration.

1936. May 20. Lord Russell of Killowen. My Lords, My noble and learned friend the Master of the Rolls has prepared, and allowed me to peruse, an opinion upon the subject of these appeals, which deals in detail with the points raised and argued before us, and states the conclusion to be reached in regard to each of the premises in question in these appeals. While I agree with his reasoning and conclusions, except as to one comparatively unimportant matter, I have thought it advisable to add some observations of my own.

The questions which we have to decide may be said, if envisaged from one point of view, to arise for decision for the first time: but looked at from another angle their solution involves a consideration of former authorities on the question of rateable occupation. They are, however, essentially new questions, for we have to decide for the first time whether premises are so let out as to be capable of separate assessment.

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(1) [1895] A. C. 117.
(2) (1784) Caldecott 407, 414.
(3) (1840) 12 A. & E. 824, 829, 830.
(4) 3 E. & E. 383.
(5) L. R. 7 Q. B. 90, 98.
(6) L. R. 10 Q. B. 70, 444.
(7) 9 Q. B. D. 585; 10 Q. B. D. 327.
(8) [1894] 2 Q. B. 852.
(9) [1911] 2 K. B. 195.
(10) (1923) 21 L. G. R. 511.

The Railways (Valuation for Rating) Act, 1930 (which may be conveniently referred to as the Act of 1930) put an end to the system of valuing railways for rating purposes which was formerly prevalent in England, and under which each rating authority valued separately the section of the railway situate within the limits of its own area. The Act of 1930 created a new rating authority, called the Railway Assessment Authority, whose duty it is to prepare at intervals a railway valuation roll showing the net annual and rateable values of every "railway hereditament" in England; the particulars relating to each railway company being entered in a separate part of the roll. Having ascertained the net annual value of the undertaking as a whole, the authority has to apportion that value among all the railway hereditaments in England occupied by that railway company. The relevant matter to note is that nothing which is not a "railway hereditament" is to be included in the roll. Any hereditament which is not a "railway hereditament" is liable to be rated by the appropriate authority, under the general law of rating.

The crucial provision of the Act of 1930 at this point comes into view, namely, the definition of "railway hereditament". It runs thus:—

"Railway hereditament means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company:

"Provided that no premises occupied as a dwelling house, hotel or place of public refreshment, or so let as to be capable of separate assessment, shall be deemed to be, or form part of, a railway hereditament."

Other parts of the Act of 1930 make it clear, in my opinion, that nothing can be a "railway hereditament" unless it is occupied by the railway company; and it was common ground in the arguments addressed to us that the word "capable" in the proviso meant capable both in fact and in law. Further it is to be observed that by the words "subject as hereinafter provided", the proviso is incorporated into the definition. Three results would appear to follow: (1.) that premises, by whomsoever occupied, if occupied as a dwelling-house, hotel or place of public refreshment, can never be deemed to be or form part of a railway hereditament; (2.) that no premises which, according to law, are in the rateable occupation of some person other than the railway company can be deemed to be or to form part of a railway hereditament; and (3.) that such premises might in fact form part of a railway hereditament.

It was contended before us that the effect of this statutory definition, by virtue of its reference to capability of separate assessment, gave statutory recognition and effect to certain decided cases, with the result that your Lordships were in some way bound to treat them as correctly decided, and unable to give effect to a contrary view, should you happen to be convinced that such contrary view was right in law. I can attribute no such effect to the definition. It is open to your Lordships to declare what you conceive to be the law, unhampered by any statutory restriction.

Before considering the particular circumstances affecting the respective premises which are the subject of this appeal, I would in the first place call attention to s. 91 of the Southern Railway Act, 1924. (1) Under that section the Southern Railway Company, has power to "build .... shops .... offices or any other similar buildings .... on .... any station or railway of the company .... and to .... sell demise let or otherwise dispose of the freehold or any other interest of or in any buildings or any part or parts of buildings erected or to be erected .... over any such station .... of the Company or on the site thereof and also to sell demise let or otherwise dispose of the right to build .... on ....

(1) 14 & 15 Geo. 5, c. lxvi.

any such station or railway or upon the sites thereof respectively." In other words it has power to carve out of any station separate premises, which though still within the precincts of the station and in one sense forming part of it, may yet be disposed of to others, even for an estate in fee simple. The great majority of the premises which are the subject of this appeal have been so carved out, and are in fact situate within the precincts of Victoria Station. They may nevertheless, though themselves within the confines of the station, which itself is a railway hereditament, neither be a railway hereditament nor even form part of a railway hereditament, if they are "so let out as to be capable of separate assessment."

In the next place I would make a few general observations upon rateable occupation. Subject to special enactments, people are rated as occupiers of land, land being understood as including not only the surface of the earth but all strata above or below. The occupier, not the land, is rateable; but, the occupier is rateable in respect of the land which he occupies. Occupation, however, is not synonymous with legal possession: the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence: a mere temporary holding of land will not constitute rateable occupation. Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact—namely, whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are

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situate, but who is in paramount occupation of the particular premises in question.

A familiar instance of this competing occupancy is the case of the lodger. It has long been settled on the one hand that, in the case of lodgers in a lodging house, the lodgers are not rateable in respect of their occupancy of their rooms, but that the landlord is the person who is rateable in respect of his occupancy of the entire house. In view of the frequently fleeting nature of the occupancy of a lodger, the convenience of this view, indeed the necessity for it, is obvious; but it purports to be based upon the paramountcy of the landlord's occupation, arising from his control of the front door and his general control over and right of access to the lodgers' rooms for the proper conduct of the lodging house. And the same view as to rateability has prevailed in the case of the business lodger. On the other hand the occupation of a person residing in a flat is such that he is (generally speaking) rateable, although as a matter of practice, the owner of the block of flats usually pays the rates charging the tenant an inclusive rent.

My Lords, I cannot but feel that the position of the lodger in relation to rateability is an exceptional one, and is largely the product of practical considerations. But it can I think be justified and explained when we remember that the landlord, who is the person held to be rateable, is occupying the whole premises for the purpose of his business of letting lodgings, that for the purpose of that business he has a continual right of access to the lodgers' rooms, and that he, in fact, retains the control of ingress and egress to and from the lodging house, notwithstanding that the power of ingress and egress at all hours, is essential to the lodger. The general principle applicable to the cases where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in rateable occupation; if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts.

What I may call the landlord-control principle has been applied to cases other than lodgers. Thus in *Allan* v. *Liverpool Overseers* (1) and *Rochdale Canal Co.* v. *Brewster* (2), the Mersey Dock Board were held to be in rateable occupation of premises (part of their dock system) which they had appropriated to the use of others. In each of these cases the true ground of the decision was, I think, that the use to be made of the appropriated premises by the occupiers thereof was subject to the general control of the Dock Board. Lopes L. J. in *Rochdale Canal Co.* v. *Brewster* (3), put it thus: "In this case I have come to the conclusion that there is such a predominating right of control reserved to the Board as to prevent the occupation being so exclusive as to be rateable. In my judgment, what passed to the respondents was the licence to use the accommodation of the cranes, quays, land and water berths subordinated to the superintending control of the Board—a mere incorporeal right. They could not exclude the Board." The Lord Justice is pointing out in other words that the Board had retained the right of control over the use made of the appropriated part by the occupants thereof. On the other hand a different result was reached in the case of *Young* v. *Liverpool Assessment Committee.* (4) There such rights as were reserved to the Mersey Dock Board did not involve any control over or interference with the carrying on of their business on the appropriated parts by the occupants thereof.

Another case to be noted in this connection is the *London and North Western Ry. Co.* v. *Buckmaster.* (5) I confess that I regard that authority as unsatisfactory. Blackburn J. held that the Railway Company had, while giving a right to the Clay Cross Company to put horses in the stable, retained themselves such control over the stable that the Clay Cross Company had not exclusive occupation. In coming to this conclusion he relied upon a clause binding the Clay Cross Company to observe the by-laws and regulations for the use of the Railway Company's stations, premises and conveniences. Quain J. agreed with hesitation, though he seems to have thought that the agreement was merely one to provide stabling accommodation. He relied however on the by-laws clause and upon the Railway Company's control of the outer gates. Archibald J. also agreed, but upon the ground, insufficient per se, that the agreement was not a demise but a mere easement of occupation. In the Exchequer Chamber the six judges were equally divided, with the result that the decision below stood. Three judges held that the railway company were rateable because they retained control of the stables; the other three held that the Clay Cross Company had occupation and possession of the particular premises, and were rateable accordingly. For myself I would have decided in accordance with the latter view; but from any aspect the authority is an unsatisfactory one and well deserved the reservation of opinion expressed by Brett L.J. in the later case relating to Smith's bookstalls. Moreover having regard to the views which prevailed in *Cory* v. *Bristow* (1), it would seem that too much weight was attributed to the clause as to observance of by-laws.

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(1) L. R. 9 Q. B. 180.
(2) [1894] 2 Q. B. 852.
(3) [1894] 2 Q. B. 852, 858.
(4) [1911] 2 K. B. 195.
(5) L. R. 10 Q. B. 70, 444.

In truth the effect of the alleged control upon the question of rateable occupation must depend upon the facts in every case; and in my opinion in each case the degree of the control must be examined, and the examination must be directed to the extent to which its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them, or would be inconsistent with his enjoyment of them to the substantial exclusion of all other persons.

Before I turn to a consideration of the particular premises in Victoria Station (or some of them) which are here in question, let me say at once that I regard the forms of the documents under which they are "let out" as of small importance. There can I think be no doubt that a view once prevailed that in order to constitute rateable occupation it was necessary that the occupier should be in the position of a tenant of the

(1) L. R. 10 C. P. 504; 1 C. P. D. 54; 2 App. Cas. 262.

land; and that a mere licence to occupy, or a title to occupation in virtue of a right in the nature of an easement was not enough. Further, although authorities had established that the existence of a tenancy was not necessary, but that rateable occupation could exist in one who occupied only by virtue of a licence or easement, the old error still prevailed at times. Thus in the case of the *Holywell Union* v. *Halkyn District Mines Drainage Co.* (1), although a Divisional Court had held that the Company's easement involved occupation of such a character as to be rateable occupation (2), the Court of Appeal reversed the decision on the ground that an easement was not subject to rate, and that since the ownership of the tunnel had not been conveyed to the company but only an easement in it, the company had nothing in respect of which it was liable to be rated. (3) The House of Lords restored the order of the Divisional Court, holding that the occupation which the company enjoyed under their deed for the purpose of drainage was exclusive and therefore rateable.

In my opinion the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement.

I now turn to consider the premises in Victoria Station other than W. H. Smith & Son's bookstalls. These require separate consideration for reasons which will hereafter appear. One group consists of separate premises of a permanent character not forming part of a building used by the railway company for its own purposes. An instance of this is the National Provincial Bank. I feel no doubt that this is not a railway hereditament. Indeed the only argument of substance in favour of the contrary view was the fact that it was within the station precincts, and that therefore access thereto was cut off during the few hours at night when the station was closed. This, it was said, was the control which reduced the National Provincial Bank to the position of a lodger in their banking premises and demonstrated that

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(1) [1895] A. C. 117.

(2) 69 L. T. 112.

(3) Ibid. 705.

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their occupation thereof was merely subordinate to that of the Railway Company. A strange situation surely for a bank. Indeed this was the only argument of substance in regard to any of the premises of this class. But for this shutting off of access at night-time they would all be in substantially the same position as the two shops as to which the Railway Company abandoned their appeal before the Railway and Canal Commission and which the Railway Company has conceded are not railway hereditaments. I cannot, however, accede to the view that because the bank could not, without the consent of the Railway Company, get to the bank premises during a few hours in the middle of the night, in which no banker would normally desire to go to his bank, and throughout which hours the bank is in fact occupying the premises by means of its goods and furniture, therefore the paramount occupant of the bank premises is the Railway Company, and the occupancy of the bank is a merely subordinate affair. Other features affecting the bank's occupancy upon which some reliance was placed were (1.) that the Railway Company may decide upon the line of approach to be used by the bank and their employees in going to the premises; (2.) that the Railway Company reserve certain rights for the purpose of controlling pipes and cables which run through under or over the premises; and (3.) that the bank must observe the by-laws and regulations as to the management of the station, and the requirements of the station-master for the management of the station business and traffic. I can find nothing in these provisions inconsistent with the bank having and enjoying the exclusive occupation and possession of the bank premises for the purposes for which they are occupied, namely, for the purposes of a bank. In my opinion the bank premises are so let out as to be capable of separate assessment; they are not a railway hereditament within the meaning of the Act of 1930, and they should not be included in the railway valuation roll.

My Lords, with the exception of the Beckenham premises, the show cases and W. H. Smith & Son's bookstalls, this view applies, in my opinion, also to all the other premises under

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consideration in these appeals. I can see no real ground for drawing any distinction in the case of any. Each of them is so let out as to be capable of separate assessment and, not being a "railway hereditament" should be omitted from the roll.

As regards the show-cases, a separate point arises in regard to them, namely, whether the site which each occupies is land used for the exhibition of advertisements or for the erection of a structure used for the exhibition of advertisements but not otherwise occupied, within the meaning of s. 3 of the Advertising Stations (Rating) Act, 1889. The point is of comparatively small importance; but, in my opinion, the sites occupied by the show-cases fall within the words of the section. It is true that they contain goods—but the goods in the show-cases are not themselves offered for sale; they are displayed for the purpose of advertising the goods which are offered for sale elsewhere. They fulfil the same advertising purpose as would be fulfilled by a printed description or a pictorial representation of the same goods. They seem to me to be advertisements and nothing else; and the land occupied by a case which contains them seems to me to be both land used for the exhibition of advertisements and land used for the erection of a structure used for the exhibition of advertisements; nor is it otherwise occupied. I would hold that the Railway Company was rateable in respect of the show-cases, but only by reason of this special statutory provision.

As regards the premises at Beckenham I desire to add nothing to what is contained in the opinion of the Master of the Rolls as being the grounds upon which they should be excluded from the roll.

There remains for consideration the question of W. H. Smith & Son's bookstalls. They require somewhat separate treatment because the question of their rateability under the general rating law was the subject of decision in the Court of Appeal some 53 or 54 years ago. The present agreement under which W. H. Smith & Son, Ld., occupy the sites of their bookstalls is dated September 11, 1929, but is in substantially the

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same form as the one in force when the case of *Smith* v. *Lambeth Assessment Committee* (1) was decided. It is in form a licence to erect and continue in the stations such bookstalls as may be necessary, the number, nature and position being subject to the general manager's approval who may order the removal of any bookstall to any other site within the station. Access by all, whether servants or customers, is subject to the Railway Company's by-laws. The bookstall employees, while on the railway premises, are to be under the control of the general manager and the station-master, and in case of an employee misconducting himself at a station, he is to be removed by the licensees or, in default, by the Railway Company. The by-laws are to be observed; the bookstall servants are not to obstruct the Railway Company's servants and are to conform to the Railway Company's reasonable orders; and no employee is to be retained, contrary to the decision of the general manager. Finally the Railway Company may exercise some control over what is sold at the bookstalls; the licensees agree not to offer for sale publications of a certain objectionable character. Here no doubt there is power to exercise some slight control over the occupants' user of the site, in that they bind themselves not to offer for sale any book, pamphlet or other publication of an indecent, immoral, indelicate, illegal or seditious character, or relating to medicines for complaints or ailments of an indecent or indelicate nature; a restrictive provision which might well find its place in the lease of business premises to a bookseller as to whose rateable occupation no shadow of doubt could exist. In my opinion the occupation by W. H. Smith & Son of the sites of their bookstalls is no different from the occupation of the site of the bank premises by the National Provincial Bank Ld.: it is just as exclusive, just as paramount for rating purposes, just as permanent, and therefore just as rateable; and this notwithstanding the old decision of the Court of Appeal in *Smith* v. *Lambeth Assessment Committee* (1). That decision does not commend itself to my judgment. Lindley L.J. in a subsequent case explained

(1) 10 Q. B. D. 327.

it as a case in which it was sought to rate the same thing twice over. However that may be, it appears to me to afford another instance of the old fallacious view that a demise was necessary and a mere licence was insufficient to create rateable occupation. Thus Baggallay L.J. having pointed out that no part of the station had been demised to W. H. Smith & Son said: (1) " It is clear to me that Smith & Son are not rateable, for the effect of the indenture was simply to grant a licence . . . . Where an exclusive occupation is conferred, the grantee becomes rateable; but, where merely a right to an exclusive enjoyment passes, the grantee takes no interest which renders him liable to be rated." Brett L.J. (1) states the question as being, was there a demise or a mere licence to sell and display, and he answers it thus: " there has been no demise; the indenture creates only a licence or privilege with certain auxiliary rights," and therefore he holds that W. H. Smith & Son had no rateable occupation. Lindley L.J. (2) held there was no rateable occupation because there was no demise of any part of the station, but merely a grant of certain privileges, and no right to continue in occupation of any particular spot. It seems to me that the true question was not considered—namely, the nature of the de facto occupation by W. H. Smith & Son of the particular sites in respect of which they had been rated. The only question considered appears to have been whether W. H. Smith & Son had had sites demised to them, or whether they had a title to occupy the particular sites; but rateability does not depend on title to occupy, but on the fact of occupation. In my opinion, the sites of the bookstalls in question on the present appeal are so let out as to be capable of separate assessment. They are not railway hereditaments nor do they form part of a railway hereditament.

For the reasons which I have endeavoured to indicate I would allow these appeals except as regards the show cases. I understand, however, that your Lordships think that the show cases do not come within the special statutory provision of the Act of 1889. Upon this footing I agree that the appeals should be wholly successful.

(1) 10 Q. B. D. 327, 330. (2) Ibid. 331.

I think it right to point out that this result accords with what I think would have been the decision of MacKinnon J. had he not felt himself bound to decide otherwise by reason of the decision in *Smith* v. *Lambeth Assessment Committee.* (1)

LORD MACMILLAN (read by LORD MAUGHAM). My Lords, I have had the privilege of studying in advance the opinion which my noble and learned friend Lord Russell of Killowen has just delivered and also that which the Master of the Rolls is about to deliver. They deal so exhaustively and to my mind so satisfactorily with the varied subject matter of these appeals that it only remains for me to express my agreement with them. Upon the one minor point on which my noble and learned friends are in disagreement—namely, as to the application of the Advertising Stations (Rating) Act, 1889, to the show cases in Victoria Station, I find myself on the side of the Master of the Rolls. The Act deals with "land used temporarily or permanently for the exhibition of advertisements or for the erection of any hoarding, post, wall or structure used for the exhibition of advertisements." I read the word "advertisements" here in its commonly accepted sense as referring to bills and posters, and while the goods contained in the show cases are undoubtedly placed there for the purpose of advertising their merits, I do not think that the goods themselves are advertisements within the meaning of the Act. The land occupied by the show cases is accordingly not, in my opinion, used for the "exhibition of advertisements," although it may be said to be used for the purpose of advertising. The exhibition of actual goods for advertising purposes is a comparatively modern innovation and at the period when the statute was passed, as appears from the law reports, the question in agitation was as to the rating of bill-posters' hoardings; it is reasonable to infer from this as well as from the language of the statute that it is to this type of advertising that the Act was intended to apply.

I desire to add only a few words as to the Scottish cases which have arisen under the Act of 1930. The problem arising with regard to the subjects to be included in or excluded from the railway valuation in Scotland is identical with that presented in England, for in s. 22, sub-s. 9, of the Act, which contains provisions as to the value of the Scottish portions of a railway undertaking carried on in England and in Scotland, it is enacted that, for the purposes of that section, " premises occupied as a dwelling house, hotel or place of public refreshment or so let out as to be capable of separate assessment shall be deemed not to form part of a railway company's undertaking." The words I have quoted are an echo of the proviso to the definition of " railway hereditament " in s. 1, sub-s. 3, of the Act which has been so fully discussed in the present appeals. Their effect, as Lord Hunter points out in *London and North Eastern Ry. Co.* v. *Assessor for Glasgow* (1), is " to assimilate the position in England and Scotland so far as subjects which are to be deemed part of the undertaking for rating purposes are concerned."

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(1) 10 Q. B. D. 327.

Under the former law in Scotland, contained in s. 20 of the Lands Valuation (Scotland) Act, 1854, the question in the numerous cases which arose was whether particular subjects formed part of the railway undertaking. It is not without interest to note that in *North British Ry. Co.* v. *Greig and Mackay* (2), it was held that station refreshment rooms let to a tenant were not part of the railway undertaking, while railway bookstalls were. Both Lord Hunter and more emphatically Lord Pitman in *David Allen and Sons Billposting, Ld.* v. *Assessor for Clydebank* (3), express the view that the formula defining " railway hereditament " in s. 1, sub-s. 3, and embodied in s. 22, sub-s. 9, provides a new statutory test which supersedes the necessity of referring to the authorities under the previous law. That is no doubt largely true but the new statutory test itself contains words which require construction. It is necessary to determine whether the subjects are " let " or whether only a licence to use them has been given such as does not amount to a letting; and it is necessary also to determine whether they are " capable of separate assessment," for it is plain from para. 21 of the 11th Schedule to the Local Government Act, 1929, that a hereditament may be let out to a tenant "but not so as to be capable of separate assessment." On these points, as your Lordships have found, it may still be useful to seek light from some of the earlier cases.

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(1) 1936 S. L. T. 181, 183.
(2) (1866) 4 M. 645.
(3) 1936 S. L. T. 163, 168, 172.

My Lords, I do not propose to detain your Lordships by an examination of the Scottish cases under the Act. It is enough to say that I do not find anything in them which is inconsistent with the conclusions which your Lordships have reached in the present appeals, of which indeed I find an intelligent anticipation in Lord Pitman's statement that "if a site for a shop is let out, whether it be a space on the platform of a railway company or otherwise within the premises, it must be deemed not to be part of the undertaking": *David Allen and Sons Billposting, Ld.* v. *Assessor for Clydebank.* (1) This is the more fortunate in that in Scotland appeals from the decisions of the Assessor of Railways and Canals (now, I understand, called the Assessor of Public Undertakings) are heard by the Lands Valuation Appeal Court, which is a court of ultimate jurisdiction from which no appeal lies to this House, although, as Lord Sands pointed out, the interpretation of a statute by your Lordships must be treated by that Court as binding: *Assessor for Aberdeen* v. *Collie.* (2) Hence the importance of the present decision as affecting Scotland as well as England.

LORD WRIGHT. My Lords, the questions in these appeals arise under the Railways (Valuation for Rating) Act, 1930, which I shall refer to as the Act. Under the Act the Railway Assessment Authority is required to prepare a railway valuation roll showing the net annual and rateable values of every railway hereditament in England. The question before the Assessment Authority and on appeal before the Railway and Canal Commission was whether the premises (to use a neutral term) here in question are, or are not, railway hereditaments, or in other words whether they should be excluded

(1) 1936 S. L. T. 163, 172.

(2) 1932 S. C. 304, 312.

from, or included in, the railway valuation roll. The Assessment Authority included some and excluded others, but the Railway and Canal Commission on appeal have included them all as being railway hereditaments. The Corporation of the City of Westminster, as the rating authority, now appeal to your Lordships and contend that the premises should all be excluded from the roll and separately rated.

The main purpose of the Act is to establish a single valuation of the railway undertaking as a whole, in place of the old practice of valuing each hereditament separately in the parish or rating area in which it is situate: the undertaking having been valued as a whole in so far as carried on in England, that value is to be apportioned among the railway hereditaments in England occupied by that railway company (s. 3).

In order to prepare the roll it is necessary to determine what are and what are not railway hereditaments, according to the definition in s. 1, sub-s. 3, of the Act, which is as follows:—

" 'Railway hereditament' means, subject as hereinafter provided, any hereditament occupied for the purposes of the undertaking of a railway company:

> " Provided that no premises occupied as a dwelling-house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway hereditament."

" 'Undertaking' in relation to a railway company includes, in addition to the principal undertaking of the company:—

> " (*a*) any canal, dock or harbour undertaking carried on by the company;
>
> " (*b*) any subsidiary or ancillary undertaking carried on by the company, not being a road-transport, sea-transport or air-transport undertaking; and
>
> " (*c*) the share of the company in any joint undertaking carried on by, or on behalf of, two or more railway companies not being a road-transport, sea-transport or air-transport undertaking;

but, save as aforesaid, does not include the share of the company in any joint undertaking."

Before seeking to ascertain the effect of this definition, it is necessary to state the character of the premises round which the dispute centres, which is sufficiently shown by the photographs produced ; the nature of the businesses severally carried on in them or the use to which they are put ; and the terms of the letting under which they are held.

The premises which have been selected for examination in these proceedings are certain premises in Victoria Station and certain others in Beckenham Station. Both these stations are the property of the respondents, the Southern Railway Company. I shall deal first with Victoria Station.

The premises in Victoria Station are numbered V1 to V41 : they are mostly shops of the lock-up variety, and in particular that type of shop generally known as a kiosk : there are also a branch of the National Provincial Bank, certain business offices on the first floor, W. H. Smith & Son's bookstalls, two hairdressing establishments and a few miscellaneous premises which are of small importance. All these premises can only be entered from the station, mostly from the open space within the station, called the "concourse": they are all within the limits of the station, which is enclosed by its outer gates, all of which are closed by the Railway Company between 12.45 A.M. each night and 6 A.M. each morning, except for a short period at 4.30 A.M. In this way access to the station is shut off during these times, save by special permission of the Railway Company.

The bank, as appears from the photograph, is a two-storey building, with a door in the centre opening on to the bank. Among the shops is Boots' chemist shop, a well-stocked chemists' lock-up shop with a basement ; the shop has been formed by taking a room on the first floor of the Station Hotel premises, by opening up the outer wall and replacing it by a double-fronted shop front. Sassoons is a long-fronted shop, with two doors, displaying for sale carpets and fancy goods ; there are also flower and fruit shops with glass fronts and sides, and entrance doors, but only one of these is now in question as the Railway Company did not object to the other two being excluded from the roll, on the ground that, though the main entrances were from the station, there were also entrances from the roadway outside. There is an omnibus office, built of wood framework with glass sides and entered by a door. The majority of the premises are kiosks, of greater or less size, for the sale of tobacco or confectionery; in these the customer is served outside, the shop attendant being inside: the type is too familiar to need further description. Another class of premises are what have been called show-cases; these are of small dimensions, exhibiting articles dealt with by the companies whose names they bear: they are built or placed against walls of the station, except one, which is erected in a central space on the concourse; necessary attachments are made for lighting. There is also a small office, partitioned off from the booking office, let to the Travellers Insurance Association, Ld., for the insurance of baggage. Of the two hair-dressing establishments, one is in the basement and consists of a large space partitioned off from the lavatories; the other is on the first floor, approached by a staircase. There are two office premises, one set occupied by the Pullman Car Co., Ld., on the second floor, approached from the station by an outer door, of which the Railway Company have the key, and by a corridor, jointly used by the Railway Company, but the offices themselves are self-contained. Much the same is true of the other set of offices, occupied by Bowman, Leadam & Grinling, Ld. There are two other premises of trifling importance; one is an office let to the Postmaster-General as a waiting room for his staff: this is in the passenger gallery, which is approached from the platforms by stairways, the exit (closed at the same time as the other gates) being on the Eccleston Bridge. There is also a small Nissen hut, of corrugated iron, to hold a small car, but dignified by the name of a motor garage.

The bookstalls used by W. H. Smith & Son, Ld., must be separately described. They are four in number and differ in size. They are constructed of timber, cut and shaped by the Company's workmen at their workshops and fitted and put together on the sites which they occupy in the station. They are of the construction familiar to all, and are of considerable size: they occupy their sites by their own weight: they have all been used on their present sites for some years without being moved, though it is said in evidence that it is possible to move them by mechanical devices. They have pipes or cables fixed for lighting and so forth attached to the structure of the station.

All these premises are in fact possessed and used by the various persons to whom they are let by the Railway Company for the purposes of their several trades or businesses.

The premises at Beckenham Junction are all within the area enclosed by the Railway Company's station yard, the outer gates of which are closed between the hours of 8.30 P.M. and 6 A.M., and all day on Sundays. Access to the station yard is thus controlled by the Railway Company, though they in practice give permission to the tenants, if they ask for it, to enter at times when the yard is closed. Certain of the premises, the subject of this appeal, consist of buildings of a permanent character, with stacking ground or storage bays attached; the tenants are builders' merchants, who use the buildings as offices and showrooms; certain other of the premises consist of a raised stacking ground, for builders' materials, with a concrete retaining wall, whereas others consist of open stacking grounds or bays for sand or other building material; in all cases the spaces let are defined and delineated on plans.

I must next examine the various agreements under which the premises at Victoria Station are held. Some are in the form of a demise or tenancy agreement, others purport to grant a licence. But substantially their effect is the same so far as concerns what is material in this appeal, that is the question whether there is or is not de facto occupation. I shall first summarize (so far as seems relevant) the effect of the form adopted in the largest group, and then refer briefly to some differences to be found in the other agreements.

I shall take as a sample of the most numerous class the agreement dated May 15, 1931, between Frederick Hotels, Ld. (described as licensees) and the railway company: the licence is to occupy and use the site situate in the booking hall and the building erected thereon, with access over the Company's adjoining premises at such time as the Company's premises are ordinarily open for business purposes; reserving the right to the Company to close their premises during the hours that they are not used for public traffic and a right to close temporarily for any special occasion: the licensees are to pay a yearly sum (free of all deductions except property tax) and a percentage of gross profits. The licensees are to pay all rates and taxes if the premises are separately assessed, and repay the same to the Company if the premises are included in the Company's assessment. There is the usual covenant to repair and yield up in good repair. The licensees are to permit the Company to enter on the premises (A) to view their state and condition, (B) to inspect and repair the Company's own adjoining premises. There are covenants against carrying on noisy or offensive trades or storing explosive or dangerous substances and so forth. The licensees agree to observe by-laws and regulations made by the Company with respect to the conduct and management of the Company's premises, and the Company are entitled to require the removal from the Company's premises of any employee whose conduct is objectionable. There is a clause for re-entry on non-payment of rent or insolvency; there is also a clause giving the Company a lien on the licensees' goods and property upon the premises; and the licensees agree that they shall not have any claim for compensation for loss of goodwill (except under the Landlord and Tenant Act, 1927). This agreement is for one year and for any renewal period.

Other agreements, not otherwise substantially different, are in the form of a demise, with a covenant against assigning or underletting, and with covenants for quiet enjoyment. In certain of the agreements, the Company reserve power to resume immediate possession of the premises if expedient for the alteration of the station or the railway lines.

The agreement relating to the National Provincial Bank is for a lease for twenty-one years of the ground floor site, with access for the bank's customers during such times only as the bank is open for the conduct of public banking business.

It contains the usual terms of a lease, with other terms similar to those set out above. Other agreements, also in the form of leases, carry the right of ingress to and egress from the premises from and to the station during such times only as the station is open for public traffic, and in some cases the right is reserved to the Company to close the station temporarily during an emergency. The agreement relating to the Pullman Car Company's offices provides for the control by the Railway Company of the outer door or entrance to the building; the door is to be kept open during ordinary business hours and not to be opened for exit after such hours. It is in form a tenancy of the offices, with right of ingress and egress over the common staircase, but otherwise with the usual terms of a tenancy: the evidence was that each night the tenants' servant left the key of the offices with the Railway Company's attendant, who handed it next morning to the office cleaner: that course seems to have been adopted for the convenience of the tenants.

The agreements for the show-cases are in a different form. They are in form simply applications for permission to exhibit and maintain advertisements, subject to conditions which present no special features.

The agreement in reference to the ladies' hairdressing saloon is in form a licence, but the licensee is to pay all rates and taxes (including landlord's property tax), and is to repair, clean and light the premises and keep them open during such hours as the Railway Company legally require: there is a provision for all rights of re-entry and otherwise of a landlord, and a provision against assigning the agreement without consent.

The only other agreement to which I need refer in detail is that of W. H. Smith & Son, Ld., which presents special features. It is dated September 11, 1929, nine months before the Act came into force, and is for a period of twenty-one years, subject to earlier determination in certain events. Like many of the other agreements, it contains a clause that it is to be deemed to be a licence only and not a demise or lease or tenancy. The first clause gives a sole licence to sell books, etc., in the Railway Company's stations. Later clauses license the licensees to erect bookstalls on the platforms, the number, size, nature and position of which are to be subject to the approval of the general manager of the Company, who has power to order the removal of any bookstall to another site in the station if he thinks it convenient for business or traffic. There is also the grant of all necessary ingress and egress for the licensees, their servants, customers and subscribers, subject to the Company's by-laws, rules and regulations at all proper and reasonable times. I must also refer, as relevant to the extent of control exercised by the Railway Company, to the provisions (1.) that the licensees' employees while at the stations or on the Company's premises shall be under the control of the Company and any employee misconducting himself shall be immediately removed from the stations and premises by the licensees, (2.) that the bookstalls shall be conducted in a regular and proper manner, (3.) that the licensees' employees shall observe the Company's by-laws and orders properly given by the Company's servants for the purpose of enabling the Company to carry on its business, (4.) that the licensees shall not offer or advertise for sale any indecent or otherwise objectionable book. There is a condition against assignment of the benefit of the agreement. The licensees undertake to repair the bookstalls. The Company are to have a power of distress. The Company are to be paid by a share of gross profits, with a guaranteed minimum sum. There is no reference to rates or taxes.

At Beckenham Junction, the agreements are in substantially identical terms. To take one instance, one of the agreements grants a licence to use the land and premises described in the schedule as a depot for storing builders' merchants' materials and no other purpose; the land is described as in the goods yard, and is that coloured red on the annexed plan. The licence is terminable on three months' notice by either party. The licensees are to pay or bear rates and taxes (except landlords' property tax) in the event either of the premises being separately assessed or not, and there is a power of distress as if for rent in arrear and as if the licensees were tenants. Clause 3 calls for special notice;

it is in these terms :—" The Company their agents servants and licensees shall have free entrance and access to and over the said premises for all purposes and at all times." There is a provision against the licensees assigning. The licensees must not use the premises except for goods which have been or will be, conveyed over the Company's system. They and their servants are not to be on the premises or in the goods yard when the yard is not open for business save with the consent of the station-master or goods agent. They are likewise to comply with any statute and all by-laws orders and regulations affecting the user or occupation of the premises. They are to keep the premises and any buildings they erect in good and clean order and repair. The Company are to have a lien on goods or other property of the licensees while on the premises. The Company have power to determine the agreement in certain events, such as insolvency, and the licensees are to have no claim to compensation for goodwill. The agreement is merely to convey a right in the licensees to enter on the premises to exercise the licence, and is not to create any leasehold interest or tenancy.

On the facts and documents which I have outlined the Railway Assessment Authority included certain hereditaments in the roll and excluded others. The line of demarcation which they adopted at Victoria Station seems to have depended on whether a customer entered the shop or other premises or did his business from the outside. The bank and Boots' shop fell within the former category ; most of the kiosks fell within the latter, but some kiosks were placed on the roll, on the ground that the counter was so recessed in the middle of the front of the kiosk that the customer stood within the general line of the front at each side of the counter. This criterion was not relied on by either side before your Lordships.

On appeal, the Railway and Canal Commission held that all the hereditaments about which either side appealed, should be included. All three judges regarded the case as covered by the authority of *Smith* v. *Lambeth Assessment*

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Committee (1); but MacKinnon J. indicated that but for that authority he would have been inclined to answer in the other sense. Sir Francis Taylor (with whom Sir Francis Dunnell agreed) was of opinion that the various tenants had only a subordinate occupation, the Railway Company being in paramount and exclusive occupation and therefore rateable, so that the premises of the tenants were not capable of separate assessment; he particularly relied on the fact that the Railway Company had sole control of the means of access to the station enclosure. This conclusion he applied also to the premises at Beckenham. He made a careful analysis of the authorities which he treated as binding him.

I shall now turn to the language of s. 1, sub-s. 3, of the Act. The essence of the definition is that the railway hereditament should not merely be occupied by the Railway Company but occupied for purposes of the railway undertaking: the scope of the term "railway undertaking" is explained to some extent by the exclusion of road transport, sea transport and air transport, and by the inclusion of any subsidiary or ancillary undertaking which the Railway Company carries on. It is clear, therefore, that the Company may occupy hereditaments which are not railway hereditaments, because they are not occupied for purposes of the undertaking as, e.g., for road transport purposes.

Now it is true that the Southern Railway Company occupies the Victoria Station as a whole for purposes of the undertaking, but it must be ascertained whether the same can be predicated of the different premises in question in these proceedings. The Company, under s. 91 of the Act of 1924, has power (inter alia) to hold, sell, demise, let or otherwise dispose of the freehold or any other interest of or in any buildings erected on the site of any station, or the right to build on any station. The Company therefore has power to let out any or all of the premises in question in Victoria Station. Before they let them out, or if they do not let them out, the premises, or at least the site, are occupied by the Railway Company and, if

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(1) 9 Q. B. D. 585; 10 Q. B. D. 327.

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occupied for purposes of the undertaking, form part of the railway hereditament. They seem, therefore, to be capable of coming within the proviso in s. 1, sub-s. 3, which, I think, contemplates that the Company by an appropriate letting out could carve out of the railway hereditament as a whole something which ceases to be a railway hereditament. So far I am referring merely to the site in the station; when the premises have been erected on the various sites, each becomes a new and separate hereditament in respect of which the question has to be considered whether as such it is ever occupied by the Railway Company at all, or if occupied by the Company, is occupied for purposes of the undertaking. The question relevant here is whether the premises were "so let out as to be capable of separate assessment." The converse phrase is to be found in para. 21 of the 11th Schedule to the Local Government Act, 1929; "any part of a freight transport undertaking let out by the company to a tenant, but not so as to be capable of separate assessment."

It is clear that something which otherwise would be a railway hereditament may cease to be such if it is so let out as to be capable of separate assessment; these words require careful definition. They refer, I think, both to the character and the conditions of the letting and also to the purpose for which the premises are let: but there is also implicit a reference to rules of law which determine the position by their application to the actual circumstances. I think the rules of law which are implicit are not the rulings in any specific decided case or cases; the circumstances of the particular letting in each of the cases now in question may not be precisely parallel to any existing authorities, and, further, an appellate Court may not accept the pronouncements in the earlier cases as truly representing the law. The language of the proviso is quite general, and I cannot find any justification for saying that it gives legislative sanction to any particular decision. In one aspect, the problem is new. But I do not think that the words mean that an entirely fresh departure is to be made in the principles of rating law, though it becomes necessary for the Court to attempt a survey of the whole of the existing authorities in order to arrive at a consistent and comprehensive appreciation of the relevant law.

The question then is whether the premises in question have been so carved out of the railway hereditament, to which they or their sites belonged, as to be capable of a separate assessment, or whether they have, though let out, been so let out as still to leave them in the occupation of the Railway Company. I disregard for the moment the further question whether, even if they remained in the occupation of the Railway Company, they were occupied for purposes of the undertaking, as defined in the section.

I shall consider first the premises in Victoria Station, that is the bank and the various shops, offices and other premises, but I shall reserve W. H. Smith & Son's bookstalls for separate consideration.

All these premises would seem to be capable of separate occupation: Boots' chemist's shop or the bank, or any one of the kiosks constitutes a hereditament, which has been erected by the tenant, to use that term neutrally: when it is let out the occupation is in the tenant: he uses it for purposes of his trade; he possesses the key; when he shuts it after business hours he still occupies it for his goods; there his position is so far identical with that of any shopkeeper who has a lock-up shop in an ordinary thoroughfare.

What is, nevertheless, contended by the Railway Company is that whatever be the tenant's position, he has at most enjoyment, and not rateable occupation: the rateable occupier is all the time the Railway Company, who, it is said, occupy the shop or other premises, just as they occupied the site as a part of the station before the premises were erected. This contention seems at the outset to confuse the station itself with the premises erected upon it. But the essence of the argument is that for rating purposes occupation must be distinguished from enjoyment, or to put it differently, that, if the tenants possess or enjoy or occupy the various shops, their occupation is only subsidiary to that of the Railway Company, who are said to have paramount occupation, in the same way as the landlord of a lodging has paramount occupation of the whole house, including the rooms let to the lodger. The position of a lodger for rating law has long been well established, but the same principle has been extended to cases where premises included in a larger whole have been let out to other persons, subject to such limitations of user and such control that these persons could not be regarded as having that sole and exclusive occupation which is the test of rateability in such cases. The premises were thus part of a larger hereditament " let out to a tenant but not so as to be capable of separate assessment."

In order to examine this contention it is necessary to refer to certain authorities. But some general propositions may first be stated. Two important principles have been clearly laid down by this House in *Holywell Union* v. *Halkyn District Mines Drainage Co.* (1) In that case Lord Herschell L.C. (2) very precisely states the general distinction: " There are many cases where two persons may, without impropriety, be said to occupy the same land, and the question has sometimes arisen which of them is rateable. Where a person already in possession has given to another possession of a part of his premises, if that possession be not exclusive he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord and his lodger. Both are, in a sense, in occupation, but the occupation of the landlord is paramount, that of the lodger subordinate." But Lord Herschell in the same case further points out that the relation of tenant to the owner of the property is not necessary to constitute rateable occupation. " Land," he says (3), " may be occupied for purposes of and in connection with the enjoyment of an easement in such a manner as to make the person so occupying liable to be rated." Later he says (4): " The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title."

The case of *Cory* v. *Bristow* (5) is also instructive in regard to certain general principles. The rateable subject matter there consisted of permanent moorings fixed by Messrs. Cory on the bed of the Thames under the right, granted them by the Thames Conservators in virtue of their Parliamentary powers, to occupy them by their hulk or derrick. The decision is important as showing that a person no less occupies in the rating sense because he does so subject to regulations or by-laws or is liable to be turned out on short notice: thus Lord Hatherley says (1): "But in the present case all the argument has turned upon this, that independently of the question whether or not this be a licence or in the nature of a demise, inasmuch as there are certain by-laws which may be made from time to time by the conservators, who have given this permission, and inasmuch as by the 91st section of the Act the power of any person to have this beneficial occupation may be determined on a week's notice, therefore, there is not conferred on the Messrs. Cory the exclusive possession of these mooring-chains which they have been permitted to place in the river as is described in the case. I apprehend, my Lords, that it would be a confusion of ideas to say that it interferes with the exclusive possession any more than a right of re-entry on the part of a landlord in certain given events could be said to interfere in any way with the right of the tenant during the time he is holding. He is in beneficial occupation for a term, though that term is limited by certain contingencies which may possibly determine his interest at an earlier period." And further Lord Cairns (2) also refers to the fact that Messrs. Cory were to work to the satisfaction of the conservators under the inspection of the harbour master: he points out that Messrs. Cory were none the less in rateable occupation because they were required to obey the conservators' by-laws, and were to work to the satisfaction of the conservators and subject to definite limitations, and were liable to be ejected on notice.

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(1) [1895] A. C. 117.
(2) Ibid. 126.
(3) Ibid. 121.
(4) Ibid. 125.
(5) 2 App. Cas. 262.

It is also clear that a person may occupy part of a larger building, though he can only obtain access by permission of the general owner, if I may so call him. Thus in the *Holywell Union* case (1), Lord Herschell expressly recognized this principle when he cited the case of *Lancashire and Cheshire Telephone Exchange Company* v. *Overseers of Manchester* (2), in which a telephone company were held liable to be rated in respect of their wires and poles where the wires were attached to the roofs or walls of houses by the permission of the occupier, who, nevertheless, retained complete control of the building, so that the company could only obtain access to the roof by his permission. Lindley L.J. said (3): " The distinction between an easement of support and the occupation of that which affords support is often very fine. I think the telephone company occupy land in the same sense as many other persons who have been grantees of easements and have been held rateable."

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(1) 2 App. Cas. 276. (2) Ibid. 274.

These statements of general principle are very relevant in considering the main features relied on as negativing rateable occupation by the tenants in the present cases. The Railway Company, it is said, have reserved such control that their occupation is paramount, and indeed they were bound to do so in order to fulfil their statutory duty of working the railway: thus they control the access or egress to and from the shops by closing the station gates all night; they require the tenants to obey their by-laws and regulations, and they impose the various restrictions contained in the agreements which I have quoted above. But in my opinion, these matters are on the authorities I have cited, and in principle, not inconsistent with the fact of rateable occupation being in the tenants: any tenant may be subject to restrictive covenants of a stringent character, such as limitations against using the premises for noxious or unlawful purposes, or covenants requiring obedience to regulations, or restrictions on modes of access, or as to the mode of conducting the business. Obvious examples are the covenants in the case of a tied house, or restrictive covenants as to the businesses permitted. These restrictions do not in themselves save the tenant from being rateable, if he is an occupier in other respects. I cannot find in the agreements in question any reason to hold that the tenants are not rateable. The Railway Company have no doubt quite properly imposed such restrictions as seemed necessary for the proper working of the station as a whole. They have reserved the right to close the station each night, and also a special right to close temporarily in cases of emergency: but these are merely restrictions on the tenants' user and enjoyment, and do not change their character or make the occupation other than a sole and exclusive occupation. The tenant is still in sole occupation of his premises, and has full use of them to carry on his business. As one indication of this I may refer to the terms of the agreements which give the Railway Company limited rights of entering for specific purposes, e.g., to view the state of repair, and so forth. These terms indicate a possession in the tenant adverse to the landlord. On this point I may refer again to Lord Herschell in the *Holywell Union* case (1), where he says: "If the company were to have an easement only, and were not to be in possession of the tunnels and works which they constructed, and the Duke was to remain in possession of them, it is difficult to understand why a covenant should be taken to 'permit and suffer the Duke to go down dial and measure the tunnels and shafts.'" As to the closing of the station at night, this is done outside business hours and as MacKinnon J. shrewdly observes, is rather an advantage to the tenants, because it tends to obviate the risk of burglary to which lock-up shops in public thoroughfares are peculiarly exposed. It is obvious that the tenants' occupation is continuous, because at night he occupies by his goods. The tenant is the person entitled to exclude trespassers, e.g., from the bank or Boots' shop, or to bring ejectment.

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(1) [1895] A. C. 117, 125.

(2) (1884) 14 Q. B. D. 267.

(3) Ibid. 271.

A great many authorities have been cited in support of the argument that the tenants' possession of the premises under review is only subordinate and, as it was said, analogous to that of a lodger. It is true that the lodger has never been held rateable: that was decided as long ago as 1784. I do not intend to examine the cases in detail, especially as the position of the lodger is authoritatively explained by Lord Hatherley in *Cory* v. *Bristow*. (1) "Although," he says (1), "a lodger" may have "the exclusive use of the chambers he occupies, still there is a concurrent right reserved by . . . . the person who lets the lodgings, of using the . . . . lodging house for whatever purposes he may think fit for managing the establishment and all purposes connected with it." In other words the landlord occupies his premises and uses them for his business of keeping lodgers. Such a case is far removed from the case of the tenants here, who occupy their shops in order to carry on their business. *Smith* v. *St. Michael, Cambridge* (2), was merely an application of the lodger principle to a case where the landlord, who occupied a house and lived in part of it, let certain rooms to Inland Revenue officials, who used them for their business, but the landlord was held to have had his own servants to look after the house and furniture, and to have retained the occupation, though he had agreed to give the exclusive enjoyment of the occupation to the lodger. Such was the explanation of *Smith* v. *St. Michael, Cambridge* (2) given by Blackburn J., who was a party to that decision, in *Allan* v. *Overseers of Liverpool*. (3)

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(1) [1895] A. C. 117, 123.

I must however refer to two cases much stressed in argument on behalf of the Railway Company. One is *London and North Western Ry. Co.* v. *Buckmaster*. (4) The premises in that case consisted of "a stable for the accommodation of four horses" at the Clapham Station, situate within the fence of the company's premises, though it appears that the gates were not closed. In the Queen's Bench, Blackburn, Quain and Archibald JJ. (Quain J. with great hesitation) held that the agreement should be construed as a licence and not a demise of the premises for the time being: Quain J. was of opinion that all that the agreement involved was the providing of stable accommodation for four horses. Blackburn J. thought that the stable might be held to remain part of the station premises and under the control of the company, so

(1) 2 App. Cas. 262, 276.
(2) 3 E. & E. 383.
(3) L. R. 9 Q. B. 180, 192.
(4) L. R. 10 Q. B. 70; 444, in Cam. Scacc.

that the railway company were the proper occupiers. Emphasis was placed by him on the provision that the tenants were to be subject to the company's by-laws. In the Exchequer Chamber, the judges were equally divided, and the decision of the Court of King's Bench stood. Amphlett B. (delivering the judgment of himself, Lord Coleridge C.J. and Pollock B.) agreed with the Court of Queen's Bench: they thought it highly improbable that the railway company had intended to grant a demise with no provision against alienation, and no power of re-entry: they also thought that all that was given was accommodation for four horses in some stable. I understand these judgments as based on the view taken by the judges of the particular agreement in the light of the particular circumstances. Cleasby B. delivered the judgment of himself and Grove and Denman JJ. to the opposite effect. I find their reasoning more convincing: they held that the effect of the agreement was to hand over to the tenant the possession and occupation of the stable, the stable being regarded as a separate tenement: there was rent payable; property tax was to be deducted; possession was to be given up at a month's notice; the terms as to by-laws, they held, did not give the railway company a right to interfere with the occupation and possession of the stable. In brief they held that on the agreement as a whole, an independent possession was given to the tenant, who was accordingly rateable. Having carefully considered this case, I am of opinion that the judgment delivered by Cleasby B. was correct. But in any case I think the other judgments proceed on a view that the effect of the agreement was to reserve control over the stable, if a stable was in question, combined with a view that not a stable, but a stabling, was the subject of agreement. Though the case has been cited with approval, it is in my view most unsatisfactory as an authority, and, as I have said, I think it was wrongly decided. As appears below, it has not passed without question.

Rochdale Canal Co. v. *Brewster* (1) was a case which was similar to and followed *Allan* v. *Overseers of Liverpool.* (2) It

(1) [1894] 2 Q. B. 852.

(2) L. R. 9 Q. B. 180.

had reference to a berth at one of the Liverpool Docks. The berth was under the agreement set apart and appropriated to the use of the plaintiffs, at a rent free from deductions save landlord's property tax, the plaintiffs agreeing to pay all rates and taxes: the plaintiffs were to keep the premises in repair: they were to allow the servants and officers of the Dock Board free access to all parts of the premises and to conform to by-laws: the quay space was not fenced in from the street: the Dock Board reserved a right of re-entry in certain events. The Court of Appeal held that the plaintiffs were not rateable: Lindley L.J. thought the agreement pointed to a letting of land and not merely to the creation and enjoyment of a mere easement or license to use. But he held on the authority of *Allan* v. *Overseers of Liverpool* (1), and *London and North Western Ry. Co.* v. *Buckmaster* (2), that there was an occupation of land which was at all times subject to the control of the owner and thus was not such an occupation as to render the occupier liable: the occupation was held to be analogous to that of a lodger. This case, with *Buckmaster's* case (2) and certain earlier cases were much relied upon by Sir Francis Taylor in his careful judgment in the Railway and Canal Commission; but in my opinion it, like so many of the earlier cases, can only be justified, if at all, as based upon the special view taken by the Court of the particular circumstances of the case. As Lord Herschell said rateable occupation is a question of fact, by which is meant that it must be ascertained by considering all the circumstances of the case. It may be that in *Brewster's* case (3) the circumstances were such (perhaps because of the peculiar position of the Dock Board and its special duties) as to involve a constant and general control over the berth in question so as to prevent the tenant being rated separately. If that is so, the position is different from the position, as I understand it, of the premises in question in Victoria Station. Indeed *Brewster's* case (3), was distinguished in a case which appeared to present many similar features: that was *Young* v. *Liverpool*

(1) L. R. 9 Q. B. 180. (2) L. R. 10 Q. B. 70, 444.
(3) [1894] 2 Q. B. 852.

Assessment Committee (1) where there was a lease of a vault and quay space in a Liverpool Dock for purposes of a bonded warehouse. The premises were wholly within the dock walls and access could only be obtained by passing through gates in the absolute control of the Board: the lessees had the keys of the premises: they had to leave for the use of the Dock Board free access to certain machinery belonging to the Board in the docks: the lessees were to be subject to the by-laws and to certain restrictions: they agreed that the user of the premises should be so worked by the company as not to cause interference with the general working of the dock and that the servants of the Board should at all reasonable times have free access for the purpose of such general working. A Divisional Court (Lord Alverstone C.J., Hamilton and Avory JJ.) held that the lessees were in rateable occupation. Hamilton J. relied in part on the use of the word "demise," though he pointed out that the use of a term of art cannot alter the truth; he held that the various covenants on the part of the lessee, though some were special, did not turn the position into that of a mere licensee. Indeed he thought the covenants giving the lessors control as to particular matters pointed to there being no general right of control reserved in the lessor. The Court clearly attached no special importance to the fact that access to the premises was by gates controlled by the lessors. In *Brewster's* case (2), there was no such control of access. This in itself supports what I think is otherwise clear, that control of access by a landlord is not decisive against a tenant being in rateable occupation.

As I understand the circumstances of *Young's* case (1), I think it was decided on right principles. But *Smith* v. *Lambeth Assessment Committee* (3) was in my opinion wrongly decided and was based on an erroneous view of the relevant circumstances and of the law. I must consider that case separately when I deal, as I now do, with the bookstalls.

On the description of the facts and the agreement in reference to W. H. Smith & Son's bookstalls which I have given earlier in this opinion, I think that on principle they are so let out as to be capable of separate assessment and ought to be excluded from the roll as not being railway hereditaments. They are premises of considerable size, occupying definite areas which they have occupied for a long time without being moved. It is true that the Railway Company reserve power to change the sites, but the evidence is that they do not ever, or only at very rare intervals, exercise that power ; while the stalls remain in a particular site, the site is occupied by W. H. Smith & Son. In *Electric Telegraph Co.* v. *Overseers of Salford* (1), where the subject of assessment consisted of telegraph posts of which the landowners could direct removal at will, it was held that there was exclusive occupation of the soil by the posts so long as they were not required to be moved. There was sufficient permanence to constitute rateability. That principle applies in my opinion to the bookstalls. They and the sites on which they stand are in fact beneficially occupied, like any of the other shops or premises in the station : it would be unfair that they should escape being rated while the other premises are rated. But it is said that the terms of the agreement are such as to involve nothing more than a mere permissive licence, because a pervading control is exercised at all times over W. H. Smith & Son and their servants. I cannot accept this view. I have referred to *Cory* v. *Bristow* (2), in which this House held that obedience to by-laws and subjection to control in the conduct of the business carried on, were not inconsistent with occupation. Regulation of right of access is not here material. The various terms undertaken by W. H. Smith & Son such as their agreement not to interfere with the business or traffic of the Railway Company and not to sell or exhibit publications which are detrimental to the Company's interests, are only of the same character as the restrictive covenants which have so often been referred to already in this opinion. There is a covenant to repair the bookstalls ; the Railway Company are given power of distress ; though there is the usual clause that the agreement is to operate as a licence only and not as a demise or lease or tenancy, such a clause cannot change the true nature of the agreement. In any event the question is whether there is de facto occupation; I think there is, though in terms only a licence and liberty are given. I cannot regard the bookstalls as other than independent hereditaments, capable of independent occupation, and in fact occupied by W. H. Smith & Son and no one else; I cannot see how the Railway Company can be said to be in occupation of the bookstalls, or how they can be regarded as bearing to W. H. Smith & Son the same relation as a landlord bears to his lodger. Such a view seems to me to involve a confusion between the station area which is not let and the specific hereditament which is let. Nor can the question be decided by considering that before the Railway Company let the bookstall site they were in complete occupation of the whole area including that site, and remain in occupation still of the surrounding area: the theory of the lodger does not depend on the fact that the landlord still lives in the house, but on the fact that he still retains control for purposes of his business of the whole house: here, I think, the Railway Company does not retain such control quoad the bookstalls, but lets out the bookstalls to W. H. Smith & Son for purposes of their separate business.

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(1) [1911] 2 K. B. 195.

(2) [1894] 2 Q. B. 852.

(3) 9 Q. B. D. 585; 10 Q. B. D. 327.

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(1) 11 Ex. 181.

(2) 2 App. Cas. 262.

But this opinion is contrary to the decision of the Court of Appeal in *Smith* v. *Lambeth Assessment Committee* (1) given in 1882, by a Court composed of Baggallay, Brett and Lindley L.JJ. The judgment of Brett L.J. is quite short and may be quoted in full. "In this case the question is whether the indenture dated the 25th of April, 1872, amounts to a demise of part of Waterloo Station or is merely a licence to sell books and newspapers with leave to display and keep the same on different parts of the station. Parts of the indenture look like a demise, others are wholly inconsistent with an intention to create an interest of that kind. In order to ascertain the true meaning the whole instrument must be looked at; parts of it must not be taken separately, the question arises upon the whole. The grantees are called the 'tenants'; but they can go into the station only at reasonable, that is particular, times and for limited purposes; the rent is to be paid for the whole of the licence or privilege granted; the bookstalls and cupboards have been erected with the approval of the Company's engineer and are moveable at pleasure, for it is for the Company to direct where they are to be placed. It is clear upon these facts that there has been no demise, the indenture creates only a licence or privilege with certain auxiliary rights. In this view Smith & Son have no rateable occupation; the only manner in which the bookstalls can be rated is that the Railway Company must be assessed at an enhanced value. It is not necessary to refer at length to the cases which have been cited. I need only say that I reserve until a proper occasion my opinion whether *London & North Western Ry. Co.* v. *Buckmaster* (1) was correctly decided." The other judgments are in substance the same. It is obvious that what is considered here by the Court is merely the language of the agreement; yet it is clearly established, as I need not repeat, that what is material is not necessarily the terms of the grant, but the de facto occupation which may be greater or less than the terms convey. The question is not concluded by saying it is an easement, not a demise. The limitations which Brett L.J. treats as decisive are merely restrictive covenants. The fact that a single rent is paid both for the occupation and use of the bookstalls and for the sole and general privilege of selling books and so forth in the station cannot affect the nature of the use and occupation. Lindley L.J. distinguishes *Cory* v. *Bristow* (2) simply by saying that in that case there was, and in the case before him there was not, exclusive occupation; that is merely to state, not to justify, the distinction. This case cannot be regarded as an authority which can help in the decision of other cases where the circumstances differ, and on that ground I have disregarded it while dealing with the other premises at Victoria Station. But for reasons which I have sufficiently explained, I think it was wrongly decided and is inconsistent with the authorities both before and since its date. It has since been followed twice in

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(1) 10 Q. B. D. 327.

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(1) L. R. 10 Q. B. 70, 444.

(2) 2 App. Cas. 262.

Scotland and once in Ireland in cases relating to bookstalls, but I do not find that it has been relied on as embodying any principle. It was explained by Lindley L.J. in *Lancashire, etc., Telephone Exchange Co.* v. *Overseers of Manchester* (1) in 1884 in a passage which at first sight is puzzling: he says "I do not feel pressed, I confess, with the case of *Smith* v. *Lambeth Assessment Committee* (2), because there it was attempted to rate two people for the same things. There the Railway Company were rated for the land for which it was also sought to rate Smith, but here nobody is rated for this occupation. I cannot find any distinction in principle between the present case and *Electric Telegraph Company* v. *Overseers of Salford* (3) and *Cory* v. *Bristow*." (4) The two cases which Lindley L.J. cites would seem to lead to the conclusion exactly opposite to that which was reached in *Smith* v. *Lambeth Assessment Committee* (2), but it seems that an attempt was in fact being made to rate two persons for the same premises, because the Railway Company were already paying rates on the bookstalls, their value being included in the general rate for the station charged upon the Company. This may explain why the Court decided as it did, but is not in logic a sufficient ground for the decision. Nor can it apply now when the question is whether the bookstalls are railway hereditaments; if they are not, W. H. Smith & Son will be rated, but the Railway Company will not.

It has been strenuously argued that the authority of *Smith* v. *Lambeth Assessment Committee* (2) has stood so long that it should not now be overruled and reliance has been placed on expressions of opinion in this House in certain cases that a decision of old standing should not be departed from. But there is no rule which debars your Lordships from doing justice even at the cost of reversing an old authority, that is an authority of a Court inferior to this House. It is true that in *London County Council* v. *Erith Churchwardens* (5) Lord

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(1) 14 Q. B. D. 267, 272.

(2) 9 Q. B. D. 585; 10 Q. B. D. 327.

(3) 11 Ex. 181.

(4) L. R. 10 C. P. 504; 1 C. P. D. 54; 2 App. Cas. 262.

(5) [1893] A. C. 562, 599.

Herschell said that he deemed " it inexpedient to interfere in such a matter as this with a long course of practice supported by decisions which are not of very recent date. Therefore, even if it be not possible to rest upon grounds altogether satisfactory the exemption of these sewers, yet the case being, as I have said, a very particular one, I could not advise your Lordships to depart from a practice which has prevailed for a very long period, and which has been sanctioned by judicial authority." He was dealing with the rating of sewers, but in *West Kent Main Sewerage Board* v. *Assessment Committee of Dartford Union* (1) this House did depart from the old rule in regard to the rateability of underground sewers. Lord Atkinson put the question " whether this House ought still to be deterred, despite the difficulties which have arisen in rating operations, from sweeping away this anomalous exemption, and putting the law in respect to the rating of sewers on the sound and rational basis upon which the law has by recent authorities been put in respect of other rateable subjects of property, simply because it might place unforeseen burdens on sewer authorities, or render more onerous the engagements into which they have heretofore entered in the belief that the anomaly would continue." The question and the answer are peculiarly pertinent in this case. He answered it in the negative. In *West Ham Union* v. *Edmonton Union* (2) Lord Loreburn admirably stated the general principle: " Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them."

There are many reasons why, if *Smith* v. *Lambeth Assessment Committee* (3) was, as I think, wrongly decided, this House should in the present case not give effect to that judgment. I have referred to the peculiar circumstances which may have influenced that decision, that is, to the attempt to rate twice over. Nothing of the sort applies now. What we are concerned with is a new statutory duty imposed on a new statutory body, the Railway Assessment Authority; its duty is to distinguish railway hereditaments from others, according to the test whether the others are so let out as to be capable of separate assessment. The Act has not stereotyped any particular decision. It would be unjust, and therefore impossible in my opinion to apply one principle to W. H. Smith & Son's bookstalls and a different principle to all the other non-railway hereditaments. The Assessment Authority must act on uniform principles in preparing the roll, unless there is some absolute law to the contrary. I think there is not. W. H. Smith & Son cannot claim a sort of privilegium. It is said that it is hard for them to have to pay rates when they entered into a contract for twenty-one years on the basis of an exemption which they had enjoyed since 1882 or earlier. But when they made that contract in September, 1929, nine months before the Act was passed, it was clearly known that railway rating was to be put on a new basis. The Act commonly known as the Derating Act (1) had shown that transport undertakings were on a different footing from retail shops, the former enjoying, while the latter did not enjoy, special privileges. The position was completely different from that in 1882, and indeed, at that date there was no special reason why the Rating Authority should seek to get rid of the decision: they got their rates from the railway, if they did not get them from W. H. Smith & Son, and they could not get them twice over.

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(1) [1911] A. C. 171, 177.

(2) [1908] A. C. 1, 4.

(3) 9 Q. B. D. 585; 10 Q. B. D. 327.

In all the circumstances of the case I think this House is entitled, and indeed bound, to refuse to affirm the peculiar anomaly which would exist if W. H. Smith & Son's bookstalls were treated differently from the other shops and offices at Victoria.

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(1) Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5, c. 44).

H. L. (E.)
1936
WESTMINSTER COUNCIL v. SOUTHERN RY. CO., ETC., AND W. H. SMITH & SON, LD.
WESTMINSTER COUNCIL AND KENT VALUATION COMMITTEE v. SOUTHERN RY. CO., ETC., AND PULLMAN CAR CO.

Lord Wright M.R.

I have still to mention the show-cases about which a special question arises, by reason of the Advertising Stations (Rating) Act, 1889. This Act by s. 3 provides that where land is temporarily or permanently used for the exhibition of advertisements, or for the erection of any hoarding, post, wall or structure used for the exhibition of advertisements, but not otherwise occupied, the owner shall be deemed to be in beneficial occupation of the land and shall be rateable on it. I think that these show-cases are occupied by their owners, by means of the goods which they exhibit: so far I see no distinction in principle from the other premises which I have discussed. But the question remains whether they fall within the last-mentioned Act. I do not think they do. The Act, I think, is dealing with what in ordinary parlance would be called advertisements, such as posters, hoardings, and so forth. What are exhibited in the show-cases are goods, not advertisements. It is true that the goods are not exhibited for purposes of being sold, at least on the spot, though no doubt they might be purchased by arrangement made at the shop. The show-cases in truth might fairly be regarded as shop windows, though placed at a distance from the actual shop. I do not think they fall within the Act of 1889.

As, in my judgment, the Railway Company are not in occupation of the premises in question, it is not necessary to determine whether, if they had been in occupation, the premises could have been properly held to be railway hereditaments within the Act.

I have still to deal with the premises at Beckenham Junction. I have described what they are and referred to the relevant agreements. They are specific and delineated sites and capable of separate occupation just as much as the shops at Victoria. The limitation of access is in principle the same. The restrictions on the rights of user, in particular, the condition that they are not to be used for the storage of goods other than goods which have been conveyed or are about to be conveyed by the Company's railway, are not different in principle from the various restrictive covenants which I have discussed. The agreements are in the main similar in form to those which have been summarized in connection with Victoria Station. They expressly contemplate the possibility of the premises being separately assessed, or of being included in the general assessment of the railway. I should not have thought that the agreements were in a form which called for any separate discussion after what I have said of the agreements relating to Victoria Station, were it not for clause 3 which I have quoted above (1). If that clause could be read literally at its face value and without qualification, I should be of opinion that it was not consistent with the tenant having an independent occupation, that is, if it were construed as entitling the Company by its servants to go in and upon the premises at all times for all purposes. These latter words read literally would give the Company power to fill the premises with the Company's goods and would negative exclusive occupation on the part of the tenants. But so read, the clause would be inconsistent with the whole tenor of the agreement. The agreement must be read as a whole, and clause 3 must be construed so as not altogether to destroy the grant. I think the rights which the clause gives are not wider than those to be found in the clause I have quoted from *Young* v. *Liverpool Assessment Committee*. (2) Apart from clause 3 I construe the agreement as giving an independent occupation, and I construe clause 3 as giving right of access not inconsistent with exclusive occupation as that term is understood in rating law.

I think the appeals should succeed.

Ordered that the orders of the Court of the Railway and Canal Commission complained of be reversed and that the cause be remitted back to the Court of the Railway and Canal Commission with a direction (I.) *that the part of the First Valuation Roll (as completed by the Railway Assessment Authority) relating to the Southern Railway Company should be amended by excluding from the Railway*

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(1) See pp. 547, 548, ante.

(2) [1911] 2 K. B. 195.

H. L. (E.)
1936
WESTMINSTER COUNCIL
v.
SOUTHERN RY. CO., ETC., AND W. H. SMITH & SON, LD.
WESTMINSTER COUNCIL AND KENT VALUATION COMMITTEE
v.
SOUTHERN RY. CO., ETC., AND PULLMAN CAR CO.

Hereditament the particular hereditaments in question in the first named appeal, (2.) *That the particular hereditaments at Victoria and Beckenham Stations specified in the second named appeal should not be restored to the Roll: Ordered that the respondents the Southern Railway Company and W. H. Smith and Son, Limited, do pay to the appellants the Mayor, Aldermen and Councillors of the City of Westminster the costs incurred by them in respect of the first named appeal to this House: Further ordered that the respondents the Southern Railway Company do pay to the appellants the Mayor, Aldermen and Councillors of the City of Westminster and the County Valuation Committee for the County of Kent the costs incurred by them in respect of the second named appeal to this House: Further ordered that W. H. Smith and Son, Limited, do repay to the Mayor, Aldermen and Councillors of the City of Westminster any costs paid by the said Mayor, Aldermen and Councillors of the City of Westminster under the order of the Court of the Railway and Canal Commission of the* 15*th day of April,* 1935, *the subject of the first named appeal to this House: Further ordered that the cause be remitted back to the Court of the Railway and Canal Commission to do therein as shall be just and consistent with this judgment.*

Solicitors for appellants: *Sharpe, Pritchard & Co.*

Solicitors for the Railway Assessment Committee: *Torr & Co.*

Solicitor for the Southern Railway Company: *W. Bishop.*

Solicitors for W. H. Smith & Son, Ld.: *Bircham & Co.*

Considered. In re DUKE OF NORFOLK [1950] 1 Ch. 467

[HOUSE OF LORDS.]

H. L. (Sc.)*
1936
March 6.

CHRISTIE AND OTHERS . . . . APPELLANTS;

AND

THE LORD ADVOCATE, ON BEHALF OF THE COMMISSIONERS OF INLAND REVENUE . . . . RESPONDENTS.

Revenue—Estate duty—Property passing on death—Settled property—Cesser of life-rent—Interest ceasing on death—Finance Act, 1894 (57 *&* 58 *Vict.*, *c.* 30), *ss.* 1, 2, *sub-s.* 1 (*b*); 7, *sub-s.* 5.

A testator by a trust disposition and settlement and codicils thereto, after providing for his debts and other expenses and making other dispositions, directed his trustees to divide the balance of the annual income of the trust into ten equal shares and to pay five of these to his wife and one to each of his four daughters and his sister-in-law during their respective lives. Should any of his daughters die leaving issue, the share of income which would have been payable to her was to be applied for the maintenance and education of her issue until the youngest of them should have attained the age of twenty years and thereafter should be paid in equal portions during their lives to such of them only as were daughters. After certain other declarations he further provided that after the death of his wife no beneficiary should receive more than 600*l*. per annum from the income of the trust and that the balance should be otherwise disposed of as directed.

The testator was survived by his wife, his four daughters and his sister-in-law, and for a time the income of the trust fund belonged, and was paid, as to one moiety to the widow, as to one-tenth to the sister-in-law, and as to one-tenth to each of the four daughters. One-tenth of the income of the fund amounted annually to 2800*l*.

Mrs. N., one of the four daughters, died leaving three children her surviving. At the date of her death her mother was still living:—

Held, that as Mrs. N. was immediately before her death entitled to the income of one-tenth of the residuary estate, property which produced that income passed on her death under s. 1 of the Finance Act, 1894.

Earl Cowley v. *Commissioners of Inland Revenue* [1899] A. C. 198, applied.

Present: LORD BLANESBURGH, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD ROCHE.

H. L. (Sc.)
1936
Christie
v.
The
Lord
Advocate.

Appeal from an interlocutor of the First Division of the Court of Session. (1)

The facts are stated in detail in the judgment of Lord Russell of Killowen. They are shortly summarized in the head-note.

The testator's trustees were assessed for estate duty in respect of part of his estate alleged to have passed under his will on the death of his daughter, Mrs. Norman. The whole estate was valued at 687,350*l.* The assessment was made on the basis that one-tenth of the estate, estimated after certain deductions at 68,547*l.* 12*s.* 10*d.*, passed on Mrs. Norman's death inasmuch as while she was alive she was in receipt of the income of the last-mentioned sum amounting to 2800*l.* a year.

The trustees of the estate appealed from the assessment, but the Commissioners of Inland Revenue confirmed it. The trustees of the testator's estate and the executors of Mrs. Norman presented a petition to the First Division of the Court of Session as the Court of Exchequer in Scotland under the Court of Exchequer (Scotland) Act, 1856 (19 & 20 Vict., c. 56) and the Finance Act, 1894, to recall the assessment. The Lord Ordinary in Exchequer Causes (Lord Carmont), by an interlocutor dated August 7, 1934, recalled the assessment, being of opinion that the property which passed on the death of Mrs. Norman was not the capital sum which produced the income of 2800*l.* enjoyed by Mrs. Norman, but was her life interest with all its incidents, including the possibility of its being reduced to 600*l.*; and that this life interest must be valued as directed by s. 7, sub-s. 5, of the Finance Act, 1894. (2)

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(1) 1935 S. L. T. 108, sub nom. *Dunderdale's Trustees* v. *Commissioners of Inland Revenue.*

(2) Finance Act, 1894, s. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . . .

(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole . . . .

Sect. 7, sub-s. 5: "The principal value of any property shall be estimated to be the price which, Against this interlocutor the Lord Advocate, on behalf of the Commissioners of Inland Revenue, presented a reclaiming note to the First Division of the Court of Session; upon which their Lordships of the Court of Session recalled Lord Carmont's interlocutor, and held the trustees and executors liable to be assessed in the value of one-tenth of the trust estate after deduction of income accrued to the date of Mrs. Norman's death, and dismissed the petition.

The trustees and executors appealed to this House.

1936. February 17. *James Keith K.C.* and *R. P. Morison* (both of the Scottish Bar) for the appellants. What passed under the testator's will on the death of Mrs. Norman was the interest she received under the will. That was a yearly sum of 2800*l.* liable to be reduced to a yearly sum of 600*l.* if her mother predeceased her. What was the value of that interest? It is to be estimated as directed by s. 7, sub-s. 5, of the Finance Act, 1898. It is the price which the interest would fetch if sold in the open market. That would certainly be less than would be given for an indefeasible income for life of 2800*l.* In fact, if estimated, as it ought to be, on an actuarial basis, it would represent the portion of the testator's estate passing on the death of Mrs. Norman as 32,300*l.* instead of 68,547*l.*, the sum at which the respondent would base the duty in this case. This is not a case falling under s. 2, sub-s. 1 (*b*), of the Finance Act, for no benefit accrued to the testator's estate on the death of Mrs. Norman.

In re Cassel (1); *In re Northcliffe. Arnholz v. Hudson* (2);

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in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased;" . . . .

Sub-s. 7: "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall:—

(*a*) if the interest extended to the whole income of the property, be the principal value of that property; and

(*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended. . . . ."

(1) [1927] 2 Ch. 275.

(2) [1929] 1 Ch. 327.

Attorney-General v. *Coole* (1); *Earl Cowley* v. *Commissioners of Inland Revenue* (2), were cited and discussed.

The Lord Advocate (*T. M. Cooper K.C.*), *J. H. Stamp*, and *T. B. Simpson* (of the Scottish Bar) for the respondent were not called upon to argue.

The House took time for consideration.

March 6. LORD RUSSELL OF KILLOWEN. My Lords, the late Cyril Herbert Dunderdale died on October 31, 1930. By a trust disposition and settlement dated May 25, 1896, and three codicils thereto, he disposed of his estate in trust for the ends, uses, and purposes therein mentioned, which for the purposes of this appeal may be summarized in manner following: After providing for his debts, funeral and administration expenses, certain charitable subscriptions, and a pecuniary and specific legacy to his wife, he directed his trustees to apply the income of the residue of his estate (primo) in payment of annual remuneration to his trustees, (secundo) in payment of a variable annual sum to his sister, (tertio) if and so long as the net income after deducting the payments to his sister exceeded 1500*l.* per annum the trustees were to pay such excess, up to 100*l.* in each year, to the treasurer for the time being of the Representative Church Council of the Scottish Episcopal Church. Any excess over and above the said 100*l.* was to be applied in the terms of the following provision, viz.: "(quarto) after payment of the foregoing provisions my trustees shall divide the balance of the annual income of the trust into ten equal shares and shall pay five of these to my said wife and one to each of my four daughters and to my sister-in-law . . . . during their respective lives. And I provide and declare . . . . that should any of my daughters die leaving issue, the share of income which would have been payable to her shall be applied for the maintenance and education of her issue until the youngest of them shall have attained the age of twenty years and thereafter shall be paid in equal portions during their lives to such of them only as are daughters." The testator also provided that on the death of his sister-in-law or of any of his daughters without

(1) [1921] 3 K. B. 607.

(2) [1899] A. C. 198.

having issue, her share should accrue to his wife if surviving; and that if his wife entered into a second marriage her share of the income should be restricted to one-fourth, the remaining three-fourths being equally divided among his daughters and his sister-in-law with a provision for the restoration to his wife in certain events of her original one-half. The testator then made provision (quinto) for what was to happen on the death of his wife, the effect of which was that from the time when his youngest surviving daughter should have attained the age of nineteen years the balance of the income was to be divided equally among his sister-in-law and his daughters, the issue of any of his daughters who might have predeceased taking their parent's share, but under the conditions, as regards the said income, that all males should cease to have any share or interest on their attaining the age of twenty years. And the testator further provided that after the death of his wife no beneficiary should receive more than 600*l.* per annum from the income of the trust, and that the balance (after payment of all the surviving beneficiaries and after retaining in hand one half-year's income to meet contingencies) should be paid to the treasurer of the said Representative Church Council. Finally, the testator directed that after the death of the last survivor of his wife and daughters, and the female issue if any of his daughters, and of his said sister-in-law, and of three other named persons, his estate should be realized and the proceeds divided among certain charitable objects.

The testator was survived by his wife, his four daughters, and his sister-in-law. His four daughters all attained the age of nineteen years, with the result that for some time before the year 1933 the income of the trust estate belonged and was paid (as to one moiety) to the widow and (as to one-tenth) to the sister-in-law and (as to one-tenth each) to the four daughters. One-tenth amounted annually to 2800*l.* or thereabouts.

On May 25, 1933, Mrs. Norman, one of the four daughters, died. She left three children—a boy (aged twelve) and two girls (aged nine and seven). Mrs. Norman's mother was then alive and had not remarried.

On March 16, 1934, the testator's trustees were assessed for estate duty in respect of part of his trust estate alleged to have passed on the death of Mrs. Norman, on the footing that the property which so passed was one-tenth of the whole trust estate and that the value thereof was 68,547*l.* 12*s.* 10*d.* The trustees and the executors of Mrs. Norman appealed against the assessment to the Commissioners of Inland Revenue, who maintained the assessment. The same persons then presented a petition under the Court of Exchequer (Scotland) Act, 1856, asking the Court to recall the assessment.

By his interlocutor (dated August 7, 1934) the Lord Ordinary in Exchequer Causes (Lord Carmont) recalled the assessment. Against this interlocutor the Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, presented a reclaiming note to the First Division of the Court of Session as the Court of Exchequer in Scotland, upon which their Lordships (by interlocutor dated December 19, 1934) recalled Lord Carmont's interlocutor, found that the trustees were liable to be assessed for estate duty in the value of one-tenth of the trust estate after deduction of income accrued to the date of Mrs. Norman's death, and dismissed the petition. It is from this interlocutor that an appeal is brought to your Lordships' House.

The case discloses a difference of judicial opinion upon the points involved.

Lord Carmont held (following *Cowley* v. *Commissioners of Inland Revenue*) (1) that there is a passing of property when one liferenter follows another in the enjoyment of the income of settled property, for—as he phrased it—the Finance Act, 1894, "has neither in view the interest of the deceased nor the succession of the new taker of the subject, but the mere fact of the subject of a settlement moving along the intended line." He was accordingly of opinion that there was a true passing of settled property under s. 1 of the Act. He, however, seems to have held that the property which passed was not the capital which produced the income enjoyed by Mrs. Norman but the life interest of Mrs. Norman, and that such life interest with all its incidents (including its

(1) [1899] A. C. 198.

possibilities of reduction and, I suppose, increase) must be valued under s. 7, sub-s. 5, of the Act. As he had been asked only to state his findings on the points submitted, he recalled the assessment and continued the cause.

The Lord President was of opinion that (following the *Cowley* case) (1) one-tenth of the settled property passed on Mrs. Norman's death within the meaning of s. 1; but that even if the case fell under s. 2, sub-s. 1 (*b*), the valuation under s. 7, sub-s. 7, would produce the same result as would be produced by a valuation under s. 7, sub-s. 5, of property passing within the meaning of s. 1.

Lord Blackburn thought the case fell under s. 2, but he nowhere in his judgment makes any reference to the *Cowley* case (1); he was, however, of opinion that what must be deemed to pass on Mrs. Norman's death was an interest which entitled her issue on her death to one-tenth of the income, and that the valuation under s. 7, sub-s. 7, must be on that footing and without regard to possible future reduction.

Lord Morison's view was that the case was not a section 1 case, but one which fell within s. 2, sub-s. 1 (*b*), the value of the property which was thus deemed to pass being (under s. 7, sub-s. 7), the principal value of one-tenth of the settled property.

Lord Fleming held (following the *Cowley* case) (1) that one-tenth of the settled property passed on the death of Mrs. Norman within the meaning of s. 1, and that the value of the property so passing fell to be determined under s. 7, sub-s. 5, of the Act. He was also of opinion that no different result as regards the amount of duty chargeable would flow if the case were held to fall under s. 2, sub-s. 1 (*b*), and s. 7, sub-s. 7.

It will thus be seen that the judges of the First Division, while agreeing in the result, were not unanimous in their views as to the sections which were applicable.

My Lords, I am of opinion (1.) that the case is one in which property passed within the meaning of s. 1, and that for the reasons given by Lord Carmont, the Lord President, and Lord Fleming; and (2.) that the property which passed on the death of Mrs. Norman was the property which produced the one-tenth of the income to which she was entitled immediately before her death, and which immediately thereafter became applicable for the maintenance and education of her issue. As Lord Macnaghten stated in the *Cowley* case (1), the Finance Act, 1894, has no regard to the destination of the property which passes or to the interest of the deceased, which, if it be a limited interest, can never pass. It was held in that case that on the death of the first equitable tenant for life under a settlement of real estate the property which passed on his death was neither the interest of the first tenant for life nor the interest of the second tenant for life who succeeded him, but the settled property. That case, in my opinion, is conclusive, and establishes that on the death of Mrs. Norman, the liferenter of one-tenth, the settled property (which for this purpose is the capital fund which produced the income to which she was entitled) passed on her death within the meaning of s. 1 of the Act.

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(1) [1899] A. C. 198.

But the appellants here argued that even if this were so, nevertheless what should be valued for the purpose of arriving at the amount of duty payable was the right to one-tenth of the income during the life of the testator's widow reducible on her death to an annual sum not exceeding 600*l.* As authority for this proposition a decision of my own, viz., *In re Cassel* (2) was cited. That was indeed a very special case, in which, it having been decided that the *Cowley* case (3) compelled me to treat it as falling within s. 1 of the Act, it became apparent that no capital sum could be earmarked as producing either actually or notionally an annual sum which necessarily varied in amount within elastic limits. I indicated as best I could the lines upon which a valuation might be fairly reached. The case is certainly no authority justifying a departure from the principles laid down in the *Cowley* case (3), where, as here, a tenant for life of an aliquot share of settled property dies and is succeeded by others who immediately enter into the enjoyment of the income of

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(1) [1899] A. C. 198, 212.

(2) [1927] 2 Ch. 275.

(3) [1899] A. C. 198.

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the same share. In this connection I would refer to the remarks of Maugham J. in the case of *In re Northcliffe. Arnholz* v. *Hudson* (1), which deal with the death of a tenant for life of an aliquot share of residue, and which appear to me relevant to a consideration of the present case.

For the reasons which I have endeavoured to indicate I would dismiss this appeal.

I ought to add that the widow of the testator has died since the interlocutor of the First Division was pronounced; but this fact can have no bearing upon the matters in debate.

I am authorized to say that my noble and learned friends Lord Blanesburgh, Lord Thankerton and Lord Roche all agree with the opinion which I have delivered.

LORD MACMILLAN: I have had the advantage of reading in print the opinion which has just been delivered by my noble and learned friend on the woolsack. I desire to express my entire concurrence with it.

Ordered that the interlocutor complained of be affirmed and that the appeal be dismissed with costs.

Lords' Journals, March 6, 1936.

Solicitors for appellants: *Simpson & Marwick, W.S., Edinburgh.*

Solicitors for respondent: *The Solicitor of Inland Revenue for Scotland; The Solicitor of Inland Revenue for England.*

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(1) [1929] 1 Ch. 327, 331, 332.

Applied. Commonwealth of Australia *v.* Bank of New South Wales. [1949] 2 All E.R. 755.

Considered. Commonwealth of Australia *v.* Bank of New South Wales [1950] A. C. 235

[PRIVY COUNCIL.]

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JAMES . . . . Appellant;

AND

COMMONWEALTH OF AUSTRALIA . . Respondent.

STATE OF NEW SOUTH WALES and Others (Interveners.)

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Constitution—Construction—Inter-State trade, commerce and intercourse—To be absolutely free under s. 92 *of Commonwealth Constitution—Commonwealth Parliament bound by s.* 92*—Meaning of " absolutely free "—Freedom as at the frontier—Commonwealth legislation and regulations restricting inter-State trade invalid—Commonwealth of Australia Constitution Act,* 1900 (63 *&* 64 *Vict. c.* 12), *s.* 51 (*i*), *s.* 92*—Dried Fruits Act,* 1928–35 (*No.* 11 *of* 1928 *—No.* 5 *of* 1935), *s.* 3, *sub-ss.* 1, 2, 3*—Dried Fruits* (*Inter-State Trade*) *Regulations, Statutory Rules,* 1934, *No.* 40, *as amended by Statutory Rules,* 1934, *No.* 164, *reg.* 6 (*b*) (*ii*).

Sect. 92 of the Commonwealth of Australia Constitution Act, 1900, which provides that trade, commerce and intercourse among the States shall be " absolutely free," binds the Parliament of the Commonwealth of Australia equally with the States. The language of the section, which is quite general and is in terms not subject to any exception or limitation, affords no countenance for the contrary view: it is the declaration of a guaranteed right. By " free " is meant freedom as at the State frontier or barrier—the crucial point in inter-State trade—or freedom in respect of goods passing into or out of the State, and in every case it is a question of fact whether there is an interference with this freedom of passage. On that interpretation of " free " in s. 92, the Dried Fruits Act, 1928–35, of the Commonwealth Parliament and the Dried Fruits (Inter-State Trade) Regulations, 1934, made pursuant thereto, which either prohibit inter-State trade entirely if there is no licence, or partially prohibit it if a licence is granted in accordance with the Act and Regulations, contravene s. 92 of the Constitution and are invalid.

W. & A. McArthur, Ld. v. *State of Queensland* (1920) 28 C. L. R. 530, and *James* v. *Cowan* [1932] A. C. 542, considered.

Order of the High Court of Australia (1935) 52 C. L. R. 570 reversed.

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* *Present:* Lord Hailsham L.C., Lord Russell of Killowen, Lord Wright M.R., Sir George Lowndes, and Sir Sidney Rowlatt.

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APPEAL (No. 3 of 1936), by special leave, from an order and judgment of the High Court of Australia (June 11, 1935) allowing the demurrer by the respondent, the Commonwealth of Australia, to the statement of claim of the appellant, Frederick Alexander James, and from a consequential order of Starke J. (June 28, 1935) ordering judgment to be entered in the action for the Commonwealth of Australia.

In the action the appellant, a grower and processor of dried fruits, claimed damages for the seizure by or on behalf of the Commonwealth of (1.) 50 cases of dried fruits which he had shipped on a steamship in September, 1932, at Port Adelaide, consigned to E. D. Clarton for delivery at Sydney, New South Wales, in part performance of a contract of sale, and (2.) 20 cases of dried fruits which he had shipped at Port Adelaide in October, 1932, consigned to H. Hooper & Co. for delivery at Sydney, New South Wales, in part performance of a contract.

He further claimed declarations that the Dried Fruits Act, 1928–35, of the Parliament of the Commonwealth of Australia, or, alternatively, ss. 3 and 5 (*a*) thereof, contravened s. 92 of the Constitution embodied in the Commonwealth of Australia Constitution Act, 1900, and was invalid, and that the Dried Fruits (Inter-State Trade) Regulations, made under the Dried Fruits Act, 1928–35, by Statutory Rules, 1934, No. 40, as amended by Statutory Rules, 1934, No. 164, or some part or parts thereof likewise contravened s. 92 and were invalid. He complained that under and in virtue of the Act and Regulations and a determination made thereunder, he had been prevented from sending his dried fruits out of South Australia in fulfilment of various inter-State contracts which he had made.

The Commonwealth demurred to the whole of the statement of claim, and said that the facts alleged did not show any cause of action. A ground in law for the demurrer was that the Dried Fruits Act, 1928–35, and the Regulations were valid laws of the Commonwealth, and that the acts complained of were authorized by the Act or Regulations.

The demurrer was allowed and the action dismissed. The

High Court of Australia (Rich, Starke, Dixon, Evatt, and McTiernan JJ.), in allowing the demurrer, did so because they could not hold that the Commonwealth was bound by s. 92 without departing from an opinion of the High Court given in *W. & A. McArthur, Ld.* v. *State of Queensland* (1) that the Commonwealth was not bound by the section. The judgments are reported at 52 C. L. R. 570.

The question in this appeal was whether s. 92 of the Constitution bound the Commonwealth, and, if so, whether the Dried Fruits Act, 1928–35, and the Regulations made pursuant thereto, contravened s. 92. The States of New South Wales, Queensland and Victoria intervened in support of the contentions of the Commonwealth, while the States of Tasmania and Western Australia intervened in support of the contentions of the appellant.

The relevant statutory provisions appear from the judgment of the Judicial Committee.

1936. May 4, 5, 7, 8, 11, 12, 14, 18, and 19. *Wilfrid Barton* and *K. L. Ward* for the appellant. This appeal involves the determination of two points: first, whether s. 92 of the Commonwealth Constitution, which enacts that trade, commerce and intercourse among the States shall be "absolutely free," means that that trade, commerce and intercourse shall be free only so far as State legislation is concerned and not free at all so far as the Commonwealth legislation is concerned; secondly, whether the system of limiting and restricting inter-State trade imposed by the Dried Fruits legislation of the Commonwealth is an infringement upon the freedom of trade guaranteed by s. 92. The general aspects of the Commonwealth Constitution were dealt with by Lord Haldane in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ld.* (2) [Reference was made to ss. 51, 52, 88, and 107 of the Constitution, and to the Dried Fruits legislation.] By the South Australia Dried Fruits Act, 1924, s. 20, the State sought to do what the Commonwealth seeks to do now, and in *James* v. *State of South*

(1) 28 C. L. R. 530. (2) [1914] A. C. 237, 252–3.

Australia (1) the High Court of Australia declared that s. 20 was ultra vires the State. In *James* v. *Cowan* (2) that decision of the High Court was questioned, and the Judicial Committee held that it was right, observing that if that legislation left inter-State trade absolutely free the Constitutional charter might as well be torn up. The legislation of the State having in this respect been declared invalid, in August, 1927, the Commonwealth entered the field with the Dried Fruits legislation of 1928. [Reference was made to s. 3, sub-ss. 1, 2, 3, of the Dried Fruits Act, 1928–35, and to the Regulations made thereunder.] The effect of that legislation is that no man may send any dried fruit from one State to another unless he exports that percentage of his total crop or holding which is named in the determination. The object of the legislation is to keep up prices for the benefit of the grower, but it has other effects. The Minister of State for Commerce has no power to fix a quota himself, he must do it on the report of a prescribed authority: see reg. 6 (*b*) (ii), Statutory Rules, 1934, No. 164. The result is that the Commonwealth is preventing a native of South Australia from marketing as much as 90 per cent. of his output in his own State. It further follows from this legislation and regulations—and it is not unimportant to the freedom of trade in a Federal State—that if a State does not choose to impose an internal limitation, then the grower in that State is protected because his competitors from other States can only send across a permitted small percentage. The result on an individual grower, such as the appellant, is that he is limited to marketing as little as 10 per cent. of his goods if he desires to embark at all on inter-State trade: the percentage applies if he sells one case inter-State, all the rest of his fruit beyond a permitted percentage is then sterilized in his hands. There has been a deliberate preventing of the appellant's inter-State trade until he complies with the provisions as to taking out a licence and as to exporting or destroying part of his stock.

The judges of the High Court of Australia all thought that

(1) (1927) 40 C. L. R. 1.

(2) [1932] A. C. 542.

they should follow *McArthur's* case. (1) In construing a statute what is the object or mischief to be provided for or against must be observed. That is especially the case in construing a Federal Constitution. [Reference was made to Sir John A. Cockburn's Australian Federation, 1901, at p. 14, and to *Duncan* v. *State of Queensland* (2), where it was said (3): "It is an important historical fact that one of the supposed great disadvantages of the pre-federation distribution of governmental powers in what is now the Commonwealth of Australia was the interference, both potential and actual, with freedom of intercourse among the States. . . . . It was, after long discussion, finally admitted that the continuance of such interference was incompatible with a federal union. . . . ."]

In effect the decision in *McArthur's* case (1) is the decision now appealed from, and in the judgments in the present case the opinions expressed in *McArthur's* case (1) are followed. The judges in the High Court in the present case held that if s. 92 applied to the Commonwealth, then under and by virtue of *James* v. *Cowan* (4) the Dried Fruits legislation and the Regulations infringe s. 92. That, it is submitted, is the inevitable effect. The main basis of the judgment in *McArthur's* case (1) is that if it were held that s. 92 bound the Commonwealth the effect would be to nullify s. 51 and a number of statutes passed by the Commonwealth.

Sect. 92, whatever its meaning, applies equally to State and Commonwealth. The reasons are to be found in the Constitution Act. Lord Haldane said that this Constitution followed in its main aspects the Constitution of the United States of America (5), and it is also submitted that it follows that Constitution in that it does contain a number of guarantees of the rights of individual citizens, and that s. 92 is to be considered not in any way as dividing the powers between State and Commonwealth. That section was described in more than one case in the High Court as a charter to the

(1) 28 C. L. R. 530.

(2) (1916) 22 C. L. R. 556.

(3) Ibid. 571.

(4) [1932] A. C. 542.

(5) [1914] A. C. 254.

citizens and an inviolable pact of the Constitution. This Constitution had its inception as a union not of States but of peoples, and it is so expressed in the preamble of the Constitution Act, which came into force on January 1, 1901. It was a Constitution which was framed by representatives of the citizens, and was accepted by the citizens. It would be expected that in that form of enactment the rights of the citizens would be guarded and set out. They are: s. 92 is one of the group of sections which deals with the rights of citizens, and those sections protect the political rights, the judicial rights, the trade rights, the individual liberty, and the religious rights, and give equal rights, wherever he may be, for the individual citizen. [Reference was made to ss. 7, 24, 74, 80, 88, 92, 116, 117, and 128 of the Constitution Act.] All those provisions, and there are others, are safeguards inserted in the Constitution for the protection of the citizens. These things are absolute in the Constitution, and it is the root idea of this Federal Constitution that qua commerce and intercourse between the people who become citizens of the new Commonwealth, they should be protected. If s. 92 does not apply to the Commonwealth it is obvious that the Commonwealth would have power to re-erect all those State customs barriers which led to the old border dissensions, so long as they were uniform barriers, and there is nothing in the Constitution, apart from s. 92, which could in any way prevent that.

The meaning of s. 92 is that trade and commerce are to be conducted as if the borders were not there, and that trade shall pass as freely between adjacent States as between adjacent counties in England. The words freedom of trade in s. 92 mean freedom from financial impost by whomsoever imposed, and those words are meant not only to be a limitation on any legislative authority, but also upon any executive act, and also by their general frame they prevent power being used, as it was in *James* v. *Cowan* (1), for an illegitimate purpose. The section is in an absolute and all-embracing form. When either the Commonwealth or the State are excluded from a particular sphere the Constitution says so in terms. The proviso to s. 92 equalizes taxation: it is a limitation on the generality of s. 92. This proviso inserted in the Constitution, and so carefully limited as to amount, is quite unnecessary if the Commonwealth is not bound by s. 92, because the Commonwealth if not so bound would have the fullest power of imposing import or border duties for the purpose of equalizing taxation. The proviso is itself a very clear indication that s. 92 applies equally to both Commonwealth and State whatever be its correct interpretation.

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(1) [1932] A. C. 542.

There is no provision in s. 51 (i) against discrimination, and that is important, because if the Commonwealth is prevented from imposing any burden on inter-State trade discrimination is impossible. When there is over a great field of legislation an equality of legislative power given by this Constitution, then there is no reason for assuming or drawing an inference that s. 92 excludes the State and not the Commonwealth, because the legislative powers of both State and Commonwealth as to inter-State trade are neither of them pre-eminent, they are both recognized by the Constitution. The arguments for the respondent based on *McArthur's* case (1) are two: first, that there is a line of thought running through the cluster of sections in which s. 92 stands that the States are excluded, and that the Commonwealth is given exclusive power with regard to trade and commerce: secondly, that s. 92 excludes all power to legislate as to trade and commerce, and that therefore the Commonwealth, which is granted a power by s. 51 (i), is not barred by s. 92. With regard to the first point, it is a line of thought which is extremely difficult to trace, and it cannot give to the Commonwealth that exclusive power which it does not possess, or take away from the States that which it does possess. If there be any intention or line of thought, it is to prevent any one, the Parliament of the Commonwealth or anybody else, from doing that very thing—restricting the freedom of inter-State trade. The second proposition of the respondent is that s. 92 practically destroys, or renders

(1) 28 C. L. R. 530.

practically nugatory, the trade and commerce power given to the Commonwealth under s. 51 (i). [Reference was made to *Kutner* v. *Phillips* (1) and to *Forbes* v. *Git.* (2)] This principle only applies when the two sections cannot possibly be reconciled. There must be an absolute inconsistency. The powers conferred on the Commonwealth by s. 51 (i) are not co-extensive with those of s. 92. The power of s. 51 (i) is much greater than the power denied by s. 92. If that be correct then there can be no ground for applying the theory of total exclusion. This suggested contradiction between s. 51 (i) and s. 92 only arises because of what, it is submitted, is an unwarrantable extinction of s. 92. There can be no trade or commerce that is not caught by the restriction in s. 92. The pertinent inquiry would seem to be whether the fields of s. 51 (i) and s. 92 are co-extensive, because if they are there cannot be a case for exclusion, the two sections must be reconciled.

Inter-State trade is to be absolutely free, not necessarily free from all legislative control. The Commonwealth and the States can legislate, but they must not impair the freedom of trade. There can be no greater interference than to limit the marketing of goods, and the theory of total exclusion fails. The legislation in this case is a distinct and patent interference with inter-State trade, and the Commonwealth being equally bound with the States, the interference is invalid. It is difficult to conceive that the Commonwealth, which three years ago intervened in *The King* v. *Vizzard* (3) to argue that s. 92 did bind the Commonwealth, is serious in its present view. In its Case the respondent says that if, contrary to its primary contention, it be held that s. 92 is binding upon it, then the Commonwealth contends that s. 92 is confined to a prohibition of the imposition of border or inter-State duties of customs upon goods passing from one State to another. In *James* v. *Cowan* (4) this Board delivered a judgment which, it is submitted, cannot be reconciled with that contention.

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(1) [1891] 2 Q. B. 267, 271–2.
(2) [1922] 1 A. C. 256, 259.
(3) (1933) 50 C. L. R. 30.
(4) [1932] A. C. 542.

With regard to the decisions of the High Court of Australia, the first case upon s. 92 was *Fox* v. *Robbins.* (1) The next was *State of New South Wales* v. *Commonwealth* (2), the *Wheat Case,* which was the basis of the judgment below in *James* v. *Cowan.* (3) *Duncan* v. *State of Queensland* (4), a meat acquisition case, overruled *Foggitt, Jones & Co.* v. *State of New South Wales* (5): later that case was restored by *McArthur's* case (6), and *Duncan's* case (4) was in turn overruled by *McArthur's* case (6), which was the first case in which the Commonwealth intervened to argue at length that it was not bound by s. 92. *James* v. *The Commonwealth* (7) concerned the present legislation: Mr. James sought a declaration that this legislation was invalid. The High Court said that they were bound to treat the Act as not obnoxious to the Constitution. After *The Commonwealth* v. *State of South Australia* (8) came *Roughley* v. *New South Wales, Ex parte Beavis* (9), which makes such an inroad into that definition of freedom which formed the basis of the majority judgment in *McArthur's* case (6) that it is inconsistent with that case. [Reference was also made to *Ex parte Nelson* [*No.* 1] (10); *Ex parte Nelson* [*No.* 2] (11); *Huddart Parker, Ld.* v. *The Commonwealth* (12); *Peanut Board* v. *Rockhampton Harbour Board* (13); *Willard* v. *Rawson* (14); and to *The King* v. *Vizzard* (15).] The fact that the Commonwealth intervened in the last-mentioned case (15) to argue that s. 92 does bind the Commonwealth is perhaps the best answer to the contentions now advanced by the respondent concerning the unpleasant results that would follow if the Commonwealth were held to be bound by s. 92. [Reference was also made to *O. Gilpin, Ld.* v. *Commissioner for Road Transport and Tramways* (*N. S. W.*) (16) and *Tasmania* v. *Victoria.* (17)]

(1) (1908–9) 8 C. L. R. 115.
(2) (1915) 20 C. L. R. 54.
(3) [1932] A. C. 542.
(4) (1916) 22 C. L. R. 556.
(5) (1916) 21 C. L. R. 357.
(6) 28 C. L. R. 530.
(7) (1928) 41 C. L. R. 442.
(8) (1926) 38 C. L. R. 408.
(9) (1928) 42 C. L. R. 162.
(10) (1928) 42 C. L. R. 209.
(11) Ibid. 258, 273.
(12) (1931) 44 C. L. R. 492.
(13) (1932–33) 48 C. L. R. 266.
(14) 48 C. L. R. 316.
(15) 50 C. L. R. 30.
(16) (1934–5) 52 C. L. R. 189, 212.
(17) Ibid. 157.

The general submission is that the earlier cases should prevail. It is impossible to reconcile those decisions with the full exclusive theory of *McArthur's* case. (1) It is an entirely irrelevant consideration that the interpretation for which the appellant contends would, as the respondent alleges, maim the powers of the Commonwealth. Either the power to legislate in restraint of trade is given to the Commonwealth by this Constitution or it is not. It is submitted that it is not, and that it was intentionally withheld, not by any accident, but by design, from both State and Commonwealth. It is not permissible to enlarge the powers of the Commonwealth as, it is submitted, was done by a false process of interpretation in *McArthur's* case. (1) There is in this Constitution a method by which imperfections as they are disclosed in the course of time may be corrected, and if the Commonwealth desires extended powers, then the Constitution may be amended by the method laid down in the Constitution.

It is submitted, first, that s. 92 establishes as a definite principle of the Constitution an economic system of inter-State free trade which allows an individual and his goods to pass from State to State with the same freedom as between adjacent counties in England. Secondly, s. 92 is not concerned with the division of powers between State and Commonwealth. Thirdly, s. 92 is absolute and general in terms; there is no good reason for restricting its operation to States alone, and alike from its position, subject-matter and phraseology it includes the Commonwealth in its operation. Fourthly, upon any proper construction s. 92 does not destroy the powers given by s. 51 (i), and s. 51 (i) must be construed subject to s. 92. Fifthly, the power to legislate as to trade and commerce is not made an exclusive power of the Commonwealth by the Constitution, and it is not possible by construction to extend the category of exclusive powers. Lastly, the Dried Fruits Act, 1928–35, and the Regulations made thereunder are identical in effect with the legislation found to offend against s. 92 in *James* v. *Cowan* (2), and are therefore equally invalid.

(1) 28 C. L. R. 530.

(2) [1932] A. C. 542.

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K. L. Ward followed. There has never been a single affirmative argument based on the words of s. 92 itself in favour of the respondent's contention; reliance is placed on some principle of necessary implication. Although there is overlapping of various sections of the Constitution, they all have their place in a Constitution which is designed to ensure no discrimination, uniform duties, uniform customs, no preference, absolute free trade. Sect. 92 is general in its application, and does not support any suggestion that a line of thought points to the exclusion of the Commonwealth. The suggested inconsistency between s. 51 (i) and s. 92 is neither apparent nor real. Once it is decided that there is no inconsistency between these two sections, and that s. 92 applies to the Commonwealth, then *James* v. *Cowan* (1) will cover the matter, because the present case, so far as interference is concerned, is a fortiori. A sensible reconciliation of s. 51 (i) and s. 92 is that by the former the Commonwealth can direct or regulate inter-State trade so long as it does not obstruct or limit it. Ten judges of the High Court have considered s. 92 since *McArthur's* case. (2) [Reference was made to *Roughley* v. *New South Wales* (3); *Ex parte Nelson* [*No.* 1] (4); *Willard* v. *Rawson* (5); *The King* v. *Vizzard* (6); *Gilpin's* case (7); and *Tasmania* v. *Victoria*. (8)] Although *McArthur's* case (2) has never been expressly overruled, the reasoning has not been followed in its integrity by any judges of the High Court other than Isaacs C.J. The result of the cases which have been decided since *McArthur's* case (2) is that s. 92 does not exclude all legislation by State with respect to trade and intercourse, even though it is inter-State, and would not exclude all Commonwealth legislation under s. 51 (i).

Hon. Sir Stafford Cripps K.C. and *Paul Springman* for the States of Tasmania and Western Australia, interveners supporting the contentions of the appellant. The States of

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(1) [1932] A. C. 542.
(2) 28 C. L. R. 530.
(3) 42 C. L. R. 162.
(4) Ibid. 209, 218.
(5) 48 C. L. R. 316.
(6) 50 C. L. R. 30, 51.
(7) 52 C. L. R. 189, 204.
(8) Ibid. 157, 181.

Tasmania and Western Australia are primarily concerned with the question of the interpretation of s. 92 rather than with the particular legislation which is challenged in this case: they seek to assert that under s. 92 the Commonwealth has no power to interfere in inter-State trade in such a way as to diminish its flow. The reason why the High Court in *McArthur's* case (1) came to a conclusion that the Commonwealth must be excluded from the operation of s. 92 was because they felt constrained, on account of the very wide interpretation they placed on the words "absolutely free," to find some way out by which some authority in Australia would be able to regulate inter-State trade and to preserve it from complete anarchy. And having the dilemma of either interpreting s. 92 more narrowly, as, it is submitted, it has been interpreted in the cases which have been decided since, or, on the other hand, excluding the Commonwealth from the operation of s. 92, they were enabled, by adopting the latter, to get out of what appeared to them to be a dilemma. Sect. 92, if it applies to the Commonwealth, must apply to it in precisely the same way as it applies to the States. If, therefore, the Commonwealth fell within the section, the principles which have already been applied as regards the States would apply to the Commonwealth, and this Board having decided certain matters with regard to the construction of that section in *James* v. *Cowan* (2) these same criteria would apply to the Commonwealth, and if that is so, the scope is such as to make the particular acts here in question ultra vires the Commonwealth.

One of the reasons why the High Court of Australia went wrong in *McArthur's* case (1) is because they abandoned the principles of construction applicable to such a statute as the Constitution Act. *The Queen* v. *Burah* (3), where Lord Selborne said (4): "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted," very definitely points to the necessity in a constitutional instrument of keeping close to the words of the instrument itself when a right or power is challenged, looking to see, first, whether that was a right which was granted, and secondly, whether there is anything else in the document which restricts the right so granted. It does show that one must not go outside the Constitution, and must be more strict in the construction of a document of this kind than in the case of other written documents. [Having referred to *Webb* v. *Outrim* (1); *Attorney-General for Ontario* v. *Attorney-General for Canada* (2); *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ld.* (3); and *British Coal Corporation* v. *The King* (4), counsel continued :] Four propositions regarding interpretation to be drawn from those cases are : (1.) That the antecedent circumstances leading to the Constitutional Act are immaterial for the general interpretation of the Act, but not to cut down or enlarge any specific terms of the Act. (2.) If the words of the Act are clear and precise in declaring some fundamental principle of the Constitution, it is for the Courts to find the exact bounds of the operation of the principle, but not to alter its (the principle's) content by implication. (3.) Where specific and not general powers are given to a Federal Government it is for those alleging that any specific act falls within those powers to substantiate their allegation. (4.) It is not for the Courts to fill up gaps in the powers of a Federal Government under its Constitution, even if they appear to exist. Such gaps are to be filled, if at all, by an amendment of the Constitution. Considering the Constitution Act in the light of those principles, if there is any section in the Act laying down a broad principle, then s. 51, which is " subject to this Constitution," must give way. The powers of s. 51 are not exclusive. The interpretation of s. 51 (i) has been made much too wide : it must be read as giving broader powers

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(1) 28 C. L. R. 530.
(2) [1932] A. C. 542.
(3) (1878) 3 App. Cas. 889.
(4) Ibid. 904–5.

(1) [1907] A. C. 81, 90, 91.
(2) [1912] A. C. 571, 583.
(3) [1914] A. C. 237, 252.
(4) [1935] A. C. 500, 517.

and not narrower powers with regard to trade and commerce. Sect. 51 (i) has to be read "subject to this Constitution," and therefore before exactly what the power is in s. 51 (i) can be defined the Constitution must be examined to see what other sections limit or cut down that power. [Reference was made to ss. 52, 86, 88, 90, 91, 98, 99, 100, 101, 102, 103, 104, and 112, as being the sections which might possibly qualify s. 51.]

The words "absolutely free" in s. 92 do not mean free from all regulation, but mean free from purposeful impediment, which is either to stop or diminish or prohibit the trade or commerce. It is not so much that a gap is to be found in the Constitution, but that there is a conception in it that peace, order and good government are consistent with complete anarchy of trade, commerce and intercourse. The State powers are in a large number all matters on the face of them concurrent powers. There is no express intimation in s. 92 whether it is to apply any more to a State than to the Commonwealth in matters of trade and commerce. Nothing could have been easier than to have stated quite clearly in s. 92 that it was to apply to the State Legislatures and not to the Commonwealth. Both its position in the Act and its form negative any implication that it was the intention that as between these two Legislatures—Commonwealth and State—having concurrent powers s. 92 should apply to one and not to the other. If it be that s. 92 does not bind the Commonwealth then the Commonwealth can completely prohibit all inter-State trade, or the trade between any two States.

The general scheme of the Constitution is to grant powers of four kinds: (1.) Limited exclusive powers, which were transferred or created in the Commonwealth Parliament under s. 52. (2.) Concurrent powers for the Commonwealth, subject to the Constitution, granted to the Commonwealth Legislature. (3.) Exclusive power, subject to the Constitution, continued in the States, where that had not been expressly taken away by ss. 106, 107, and 108. (4.) Concurrent power, again subject to the Constitution, continued in the States unless expressly taken away, including the power of the States to legislate on matters including trade and commerce. Under those four types of legislative power the control of inter-State trade and commerce rests concurrently in the Commonwealth and the States. If s. 92 is reasonably interpreted this structure of the Constitution allows ample power to legislate so as to regulate the incidence of free trade and commerce and to prevent commerce becoming a prey either to dishonesty or undesirable practices, and also to protect both the State and the Commonwealth from such specific matters as disease which might arise through the incidence of inter-State trade.

On the general purview of the Constitution the argument of convenience and necessity must be put right on one side. The argument that there are gaps to be filled must be left out of consideration, and the terms of the Constitution itself must be adhered to. With regard to the argument of the respondent that a number of Federal Acts have been enacted on the assumption that s. 92 is not binding on the Commonwealth, that assumption is not one which can be made except on the last Act—the Dairy Produce Act, 1933–35—which is on exactly the same footing as the Act in the present case. None of the other Acts referred to in the respondent's Case—Post and Telegraph Act, 1901–23; Secret Commissions Act, 1905; Commerce (Trade Descriptions) Act, 1905–33; Australian Industries Preservation Act, 1906–30; Seamen's Compensation Act, 1911; Navigation Act, 1912–35; Sea Carriage of Goods Act, 1924; Transport Workers Act, 1928–29; Wireless Telegraphy Act, 1905–19; and Sales Tax Acts, 1930–35—can possibly be held to infringe the provisions of s. 92, but they are very good illustrations of the sort of thing that the Commonwealth can do under s. 51. They were Acts regularizing methods of trade for the benefit of the trade: all of them were merely designed to regulate and facilitate trade and commerce by clearing out of the way obstructions which the people of Australia thought were undesirable in the channels of trade. The argument of Sir Robert Garran K.C. in *Vizzard's* case (1) really disposes of the argument as regards the inconsistency of s. 51 (i) and

(1) 50 C. L. R. 30, 36.

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s. 92, and the gap which would be left if s. 92 were interpreted to cover the Commonwealth.

With regard to the line of thought argument in *McArthur's* case (1), the only line of thought that can be said to run through Chapter IV., which contains s. 92, is that it deals exclusively with Commonwealth powers, and not with State powers, except where those State powers are exceptions to some power granted to the Commonwealth. Nothing, therefore, would be more surprising than to find a section in this Chapter which deals only with State powers, especially when followed immediately by Chapter V., which does deal with State powers. Sect. 92 binds both Commonwealth and States equally. The words "subject to this Constitution" or any equivalent words are entirely absent from s. 92: there are no words of limitation as to the generality of its application. It is a dominant clause in the Constitution. The additional word "intercourse" to trade and commerce shows the width of the declaration of rights: "trade and commerce" alone appear in s. 51. Whatever "free" in "absolutely free" means, it cannot mean free from legislation, because both the States and the Commonwealth have power to legislate on trade and commerce. "Free," it is submitted, is a political conception, it is the conception of an orderly and ordered freedom, and not the conception of a chaotic licence which would result from allowing every individual to do exactly as he wished. No impediment or hindrance is to be put upon trade among the States, it is not that its regulation is thereupon to cease.

The key to the difficulty is the interpretation of the word "free," and the only way in which a proper and sensible meaning can be given to it is in the known legislative setting in which the Constitution was made, not only in Australia, but in the world. It could not have been the intention of this declaration to make all the incidents which formed part of trade and commerce free from legislation, because that would have been contrary to the conception of an orderly community; but what was a perfectly normal and ordinary conception was that in spite of those regulations nothing should be done to hinder or prohibit trade and intercourse between States even though so to do might appear to be for the benefit of Australia as a whole. As to the proviso to s. 92, the words "notwithstanding anything in this Constitution" are meaningless unless they imply that s. 92 covers the Commonwealth. Therefore both on the general scheme of the Act, and under s. 92 alone, however they are looked at, the conclusion is imperative that this declaratory section was intended to and does in fact in terms cover both the Commonwealth and the States.

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(1) 28 C. L. R. 530.

On the criteria to be considered in examining the relevant legislation reference was made to *Russell* v. *The Queen* (1) and *Attorney-General for Ontario* v. *Reciprocal Insurers.* (2) The latter case is important because it assists greatly in considering the approach which should be made to Acts which are alleged to be infringements of a prohibition in a Constitution. The prohibition was just as effective in the case of the British North America Act as it is in the present case. Not merely the form of the legislation but the substance of it must be considered; whether, in fact, whatever its form, it does go into a territory from which the Legislature are prohibited from entering. The first consideration in the present case under s. 92 is, therefore, whether the law which is being considered is one which deals with trade and commerce as such, and having decided that it is such a law, then it has to be considered whether it restricts or prohibits the freedom of trade and commerce between States: if it does, then it is outside the powers of the Commonwealth Government. That, however, does not end the inquiry, because suppose it be decided, on a general view of the Act, that it is not dealing with trade and commerce as such, but with a different subject-matter—health regulations or the like—the inquiry then must be made whether it prohibits or restricts more than is necessarily incidental to the main subject-matter with which the Act deals. That aspect of the matter is dealt with in *James* v. *Cowan.* (3) Sect. 92 is only aimed at preserving the freedom of trade and commerce within the legislative structure that is common to civilized States.

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(1) (1882) 7 App. Cas. 829, 834.
(2) [1924] A. C. 328.
(3) [1932] A. C. 542.

Menzies K.C., A.-G. for Australia, *Gavin Simonds K.C.* and *Hon. H. L. Parker* for the Commonwealth of Australia. The question for determination goes far beyond that of the validity of one Commonwealth Act: what falls for determination is really the whole power of the Commonwealth to pass legislation in relation to inter-State trade and commerce, and by so doing to render possible schemes of marketing control for the whole of the Commonwealth. If the Commonwealth cannot control inter-State trade and commerce to the extent illustrated by the Act in question, then it is equally clear that the State cannot control it, and in that case nobody can, and marketing control in Australia is impossible. The result will be that the totality of legislative power in Australia will prove to be less than the totality of power in other civilized countries.

With regard to *Vizzard's* case (1) and the submission then made on behalf of the Commonwealth—that it was bound by s. 92—the views of 1933 are singularly of little use in dealing with how the Commonwealth Government would regard the problem in 1936. Also, behind *Vizzard's* case (1) there was a very intricate network of current politics. Until *James* v. *Cowan* (2) there was no need to resort to the Commonwealth power to make these schemes effective, the importance of that power was for the first time realized after that decision, and has been increasingly realized ever since. If in fact the Commonwealth power to deal with the substance of inter-State trade and commerce is destroyed by s. 92, then quite clearly there is a gap in Government power in Australia now which did not exist before Federation. As to the principles upon which this Constitution should be interpreted: it has been designed to serve the growing purposes of the country permanently: some breadth of interpretative method is to be applied to it. Experience has shown it to be extremely difficult to secure an amendment of the Constitution. It was said in *British Coal Corporation* v.

(1) 50 C. L. R. 30. (2) [1932] A. C. 542.

The King (1) that (2): "Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire —to cut down the provisions of the Act [the British North America Act, 1867] by a narrow and technical construction, but rather to give it a large and liberal interpretation. . . . ." A broad and real interpretation should be given in this case, which will accord with the notion of an organic law which works as an organic law should, and not some narrow interpretation which will inevitably lead to anomalies and confusion. The real business of the Constitution was to found a new organization, the Commonwealth, and to deal with its powers, which were to be national powers, by way of special grant and not by way of residue. The powers of the State are in that sense residuary powers, and they cannot therefore be completely dealt with until the business of interpreting the scope of the grant to the Commonwealth has been completed.

It has been said by the appellant that the way in which to resolve the argument about the conflict between s. 51 (i) and s. 92 is by applying ordinary legal decisions about repugnancy or repeal by implication, and that that cannot be done unless there is complete opposition between the two provisions. In more than one possible meaning there is a complete opposition between s. 51 (i) and s. 92, but that is no essential ingredient in the Commonwealth's case. It is not essential to show a complete opposition. I am entitled to draw attention to the fact that on the face of the Constitution itself the trade and commerce power is first not only in place, but among the first in national importance, and that if there are available in relation to s. 92 two interpretations, one of which will reduce the trade and commerce power to a shadow, made up, as the appellant puts it, of matters of technical and ancillary detail, and the other of which will leave it a real power to deal with the substantial questions of trade and commerce, the second interpretation should be adopted unless plain language compels the adoption of the

(1) [1935] A. C. 500.

(2) Ibid. 518.

first. That choice is the reality of *McArthur's* case (1), and the Court followed that interpretation which would avoid the anomalous result.

If the words "absolutely free" involve an absolute absolute and not a qualified absolute, then the case would be one of repugnancy. Sect. 51 (i) gives power to make laws with respect to trade and commerce among the States. Sect. 92 talks about trade, commerce and intercourse among the States. So that, with the exception of the word "intercourse," the phrase is identical. It is not easy to impute to such a phrase one meaning in s. 51 (i) and another in s. 92. The area of the power given to the Commonwealth under s. 51 (i) is, therefore, as a matter of language, the same as the area which is declared not only to be free, but absolutely free, by s. 92. The scope of the interpretation must be the same. Sect. 92, if it operates against the Commonwealth, does not operate simply against s. 51 (i), it operates against every relevant power in s. 51. It is impossible to deal satisfactorily with the question of the persons to whom s. 92 is directed without deciding as to what s. 92 itself confers: what freedom it confers, and the quality of the freedom. The following six propositions on this matter will be found running through various arguments in the cases: (1.) The first meaning of "free" is free of all law of every description. (2.) Free of any restrictions imposed upon trade and commerce by reason of its inter-State character. That is, free of any discriminating trade law. (3.) Free as trade and commerce of all interference whether specially directed to it or not. (4.) Free of all laws the pith and substance of which is a regulation of inter-State trade or commerce. (5.) Freedom attaches to trade and commerce regarded as a whole and not distributively. Individuals are not guaranteed freedom in relation to their trade and commerce so long as trade and commerce as a whole are not impaired. (6.) Free from pecuniary imposts—that is the narrowest meaning of s. 92. Those six propositions represent the various possible views which have been discussed so far.

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(1) 28 C. L. R. 530.

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[On the first and second of those propositions reference was made to *McArthur's* case (1) ; *Gilpin's* case (2) ; *Duncan* v. *State of Queensland* (3) ; and *James* v. *Cowan.* (4)]

If the test is the test of discrimination, as the passages cited from those authorities would appear to suggest, it would obviously permit every sort of restriction upon the freedom of inter-State trade so long as that restriction was common to all trade, and because of that it would ignore the fact that a special freedom was given to inter-State trade by s. 92 which was not given to intra-State trade at all. With regard to proposition three above, that is the view of *McArthur's* case (5) : it of course recognizes the fallacy of the first proposition—that trade is to be free of all law. As to the fourth proposition, *Russell* v. *The Queen* (6) shows how inappropriate is the method of approaching the Canadian Constitution when approaching the Australian Constitution. This pith and substance argument was the basis of the decision in *Ex parte Nelson* [*No.* 1]. (7) It is quite impossible for that case and *McArthur's* case (5) to live together. The pith and substance test is no test at all for the Australian Constitution. *Nelson's* case (7) was undoubtedly overruled by *Tasmania* v. *Victoria.* (8) This pith and substance view was also substantially adopted in *Willard* v. *Rawson.* (9) The passage from which the fifth proposition is taken is in *Vizzard's* case. (10) It is submitted that trade and commerce cannot be left unimpaired, or even not fenced off, if in fact a prohibition or terms are imposed upon individuals in relation to it. The whole body of authority is against the view expressed in the sixth proposition, but it is a view to which very great weight ought to be attached on the interpretation of the Constitution itself. This proposition is the one interpretation which is more consistent with the existence and force of s. 51 than any other. [Reference was made to *Duncan* v. *State of*

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(1) 28 C. L. R. 530, 550, 551, 568, 569.
(2) 52 C. L. R. 189, 205, 206.
(3) 22 C. L. R. 556, 574.
(4) 43 C. L. R. 386, 416, 423.
(5) 28 C. L. R. 530.
(6) 7 App. Cas. 829, 836.
(7) 42 C. L. R. 209, 218.
(8) 52 C. L. R. 157, 183.
(9) 48 C. L. R. 316, 335.
(10) 50 C. L. R. 30, 77, 86, 88, 91, 94.

Queensland (1); *McArthur's* case (2); *The King* v. *Vizzard.* (3)]

If proposition three above is correct, it is difficult to avoid the conclusion of the High Court that s. 92 does not bind the Commonwealth, and, assuming that the sixth proposition is wrong, it becomes more and more difficult to escape from *McArthur's* case. (2) It is impossible to find completely rational and consistent support for propositions four and five in the language of s. 92.

It was argued by the appellant that s. 92 at least prohibits border customs duties, and that if that be so it must apply to the authority which alone has the power to impose customs. It is submitted for the Commonwealth: (1.) That apart from s. 92 the States are not prohibited from imposing border duties, except by s. 92, it has to be assumed throughout that they were: and (2.) the Commonwealth altogether apart from s. 92 could not impose border duties. [Reference was made to *Fox* v. *Robbins* (4); *Duncan's* case (1); and *McArthur's* case. (2)] Reliance is placed on those three authorities to support the interpretation which it is suggested should be placed on the language of the Constitution. If the above two propositions are correct, then it follows that, in relation to border duties, the prohibition of s. 92 was never needed in the case of the Commonwealth, and therefore it is an argument against the Commonwealth being bound by the section. Whereas in the case of the States the prohibition was needed.

With regard to the inter-relationship of s. 51 (i) and s. 92, perhaps the best practical test of ascertaining what is the permitted scope of s. 51 (i), after permitting s. 92 to operate, is to look at some of the Acts of the Commonwealth passed under s. 51 (i) and no other power. Perhaps the best example is the Australian Industries Preservation Act, 1906 (No. 9 of 1906): that Act, which has been amended from time to time, depends for its validity, if s. 92 binds the Commonwealth, on whether this Board is prepared to accept the proposition that the motive criterion—the tendency or desire to benefit

(1) 22 C. L. R. 556, 570, 617.
(2) 28 C. L. R. 530, 553–4.
(3) 50 C. L. R. 30, 54, 97.
(4) 8 C. L. R. 115, 123.

trade as a whole—is sufficient to save legislation from what would otherwise be in conflict with s. 92. Even if s. 92 be subtracted from s. 51 (i) it is still left with extensive operation: it is extremely difficult to subtract s. 92 from s. 51 (i) and leave it nothing but a shadowy power. Everything points to the conclusion that s. 51 (i) should be a real national power, and nothing in the Constitution points to the whittling away of that power, except one thing—namely, that s. 92 happens to be expressed in language of generality. Reliance has been placed for the appellant on the view that because the word "intercourse" is introduced into s. 92 the scope of that section is at once seen to be different from the scope of s. 51 (i) where "intercourse" does not appear, and that that is a reason for refusing to treat them as repugnant provisions. The word "intercourse" in s. 92 can be treated as having broadly one of two significances, first, it may mean no more than commercial intercourse, and may be read ejusdem generis with trade and commerce: *Rex* v. *Smithers* (1) and *Roughley's* case. (2) If "intercourse" is to be read ejusdem generis with trade and commerce then every submission I have made on the degree of conflict between s. 51 and s. 92 remains unaffected. Secondly, if "intercourse" is a word which adds to the sense of trade and commerce, then all that it means is that it leaves s. 51 (i) as it was, but widens s. 92.

The whole method of construction adopted by Sir Stafford Cripps is no doubt perfectly applicable in construing a Constitution where there is a mutual exclusiveness between Federal and State powers, as in Canada; but in the case of the Commonwealth, where powers are for the most part concurrent powers, and are in any event put in categories only on one side, the other side being a general residue, those principles are much too narrow.

Menzies K.C., A.-G. for Australia, and *Hon. H. L. Parker* also appeared for the State of Victoria, intervening in support of the respondent's contentions.

H. E. Manning K.C. and *A. C. Nesbitt*, for the States of

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(1) (1912) 16 C. L. R. 99, 113.

(2) 42 C. L. R. 162, 179.

New South Wales and Queensland, adopted the argument of the Attorney-General for Australia. The reasoning in *McArthur's* case (1), where the conclusion was reached that s. 92 was not binding on the Commonwealth, is correct. If, contrary to that view, the section is binding on the Commonwealth, then s. 92 must receive the narrower interpretation, and the freedom referred to in that section is freedom from customs duties. [Reference was made to *James* v. *South Australia* (2); *James* v. *The Commonwealth* (3); *James* v. *The Commonwealth* (4); *McArthur's* case (5); *Roughley* v. *New South Wales* (6); *Ex parte Nelson* [*No.* 1] (7) and *The King* v. *Vizzard.* (8)]

Hon. Sir Stafford Cripps K.C. replied on behalf of the appellant. The argument on convenience raised by the Commonwealth is not a criterion in interpretation, it is a mere matter of prejudice and nothing else. On the point of there being a gap in the legislative competence, it may have been the object of the legislation to create a gap and to put it outside the power of either Commonwealth or State to legislate in that particular area. It is an area which for ever is to be free from legislation. The Attorney-General for Australia said that the Constitution is not capable of amendment freely. The more difficult it is to amend the stronger is the argument for abiding by the rigidity of the Constitution. Sect. 92 can only mean free from restrictive legislation, and not free from all legislation. The words "absolutely free" mean without restraint in a form of society which is regulated, but not without regulation. A definition of "trade and commerce" is: "Trade and commerce among the States includes all those acts which are essential to effect the physical transference of articles of commerce from one State to another." That would distinguish the merely regulatory acts which are incidental and not essential to the transference: *Municipal Corporation of City of Toronto* v. *Virgo* (9) and *Attorney-*

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(1) 28 C. L. R. 530.
(2) (1927) 40 C. L. R. 1, 18.
(3) (1928) 41 C. L. R. 442, 455.
(4) (1935) 52 C. L. R. 570, 591.
(5) 28 C. L. R. 530, 546, 549.
(6) 42 C. L. R. 162, 177.
(7) 42 C. L. R. 209.
(8) 50 C. L. R. 30, 48–9.
(9) [1896] A. C. 88, 93.

General for Ontario v. *Attorney-General for the Dominion.* (1) Sect. 92 is a dominant section, and is not qualified by any such words as "subject to this Constitution." It is intended to be overriding in its effect. Sect. 51 is not an unqualified grant of power, ss. 51 and 52 are specifically qualified grants of power.

On the question of repugnancy, the Attorney-General said that it was unnecessary for him to say that there was complete repugnance between s. 92 and s. 51, that it was sufficient if there would be an anomalous result produced by reading s. 92 as covering the Commonwealth, and that if two interpretations were open on the clear words of s. 92 then the Court must adopt that which avoids the production of an anomalous result between s. 92 and s. 51. That argument proceeds on the fallacy that there is any doubt as to the interpretation of s. 92 on the question whether it is limited to the States or the Commonwealth or applies equally to both. It is quite clear from s. 92 that it is not limited either to the Commonwealth or the States. It is not so expressly limited on the face of it. It is equally clear that those sections which are intended to be limited to the Commonwealth or the States are specifically so limited. Therefore one cannot start on the supposition that there are two different interpretations of that section; and if there be no ambiguity on that point any argument based on an anomalous result which would arise on one application or another of those words cannot be supported.

The only way to limit s. 92 is to read in words which are not there, such as "free from State legislation or interference." The effect of s. 92 on s. 51 would be the effect of a proviso, and one has to read the power as an overriding power to the extent which the proviso states. The Attorney-General admits that s. 92 cannot mean absolutely free from all legislative control whatever. The only clue in the Constitution as to the categories to which s. 92 does not apply is to be found in s. 51. It means not free from the regulation of the individual or goods in the ordinary way, but it means free from restrictions imposed on him over and above that. The

(1) [1896] A. C. 348, 363.

words "absolutely free" must be read in the light of the legislation at the time; they must mean exactly the same to-day as in 1901.

The Attorney-General's third proposition as to the meaning of "free" was "free as trade and commerce of all interference whether specially directed to it or not," and he suggested that that was *McArthur's* case. (1) It is not the proposition which was laid down in *McArthur's* case (1) [Reference was made to *McArthur's* case. (2)] A large part of the fallacy in that case results from a too wide interpretation of trade and commerce. What was decided in *McArthur's* case (1) may be put alternatively either, first, that "free" means free from all prior restraint by laws openly and directly applying to trade and commerce or by laws creating discrimination; or, secondly, that every individual act going to make up the totality of trade and commerce must be free from any interference by the law. The second of those is quite impossible. The fourth proposition of the Attorney-General is not an interpretation which can be suggested. The fifth proposition should be put in this form: "Having due regard to the necessity for all these regulatory enactments designed to produce an orderly society, and dealing with such categories of legislation as health, defence, criminal and property laws, there shall be no law passed or executive or prerogative act done which shall prohibit or restrict the physical transference of articles of commerce from one State to another." The objective of s. 92 is not the destruction of orderliness of commercial dealings or the orderliness of acts and intercourse of individuals, but to prevent the interference with inter-State commercial transactions. The criterion is, does this law restrict the free movement of these goods inter-State? Nobody has suggested that the Dried Fruits Act in this case does not restrict inter-State trade. It is not necessary to decide whether it benefits Australian trade as a whole.

With regard to the Attorney-General's sixth proposition, if s. 92 be taken as limited to customs imposts it can at most be applicable to a non-discriminatory border duty imposed by the Commonwealth. That is the only thing that can apply to it, but that on the face of it is obviously not the intention of this declaratory section. The words " absolutely free " cannot be limited to freedom from customs duties or financial imposts resulting from customs laws. It is a wider freedom than that. The result of the argument based on the six interpretations of " free " put forward by the Attorney-General is to ask the Court to decide which is the most convenient interpretation to be adopted in view of the powers which it is suggested it would be right and proper to find in the Commonwealth legislation. The suggestion is also impliedly made that whereas it is very difficult to ascertain what laws would be ultra vires under s. 92 if made by the Commonwealth, it is far easier to say that the Commonwealth is not bound at all by s. 92 and that therefore there is no need to make an examination of the laws. Neither of those two points is admissible as regards interpretation.

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(1) 28 C. L. R. 530.

(2) Ibid. 547, 549, 551, 554.

Summarizing the various points on the interpretation of the Constitution: (1.) As a matter of interpretation the surrounding circumstances at the date of the Constitution can be looked at, but not the conveniences or necessities of the present day. (2.) The words of the Constitution must be regarded strictly, bearing in mind that alterations of the powers granted can only be made by the Australian people and not by the Court. (3.) The general and unqualified sections of the Constitution must first be looked at to ascertain any fundamental reservations or prohibitions imposed by the Constitution. Such sections must be given their full ambit where that ambit is unrestricted. (4.) Sect. 92 is such a section, and there is no doubt in its terms as to its application to all legislative and executive bodies in Australia. (5.) The words " subject to this Constitution " in ss. 51, 52, and 106 mean that those sections must be read as subject to (inter alia) s. 92. The fact that such a reading cuts down or diminishes the powers under any of those sections is not material to the interpretation of s. 92, since it is clearly intended to be an overriding section. (6.) The terms " trade and commerce " have the same significance in s. 92 as in s. 51 (i), their meaning is qualified by the juxtaposition of other categories of legislative powers in s. 51, and by the express or implied inclusion of certain matters under ss. 98, 99 and 100. It is trade and commerce so defined that is to be absolutely free. (7.) "Absolutely free" must be read in the light of the surrounding circumstances in Australia in 1900, and the general practice of legislative control in civilized countries. As so read it does not prohibit interference with individual actions or specific goods by laws of different categories to trade and commerce, which are usual and customary for controlling and protecting civilized communities. (8.) The substance and not the form of an alleged infringing statute must be looked at, and if in substance it is not within the category of trade and commerce laws as above defined it does not offend against s. 92. If it is in the category of trade and commerce laws then it may offend, if it in fact results in a limitation or prohibition of the transference of articles of commerce from one State to another.

Other statutes in other categories cannot thus offend against the implied prohibition of s. 92, but executive acts purported to be done under them may so offend if they are done to restrict trade and commerce and not to regulate individual acts for the purposes of laws of another category. Although s. 92 cuts down the generality of powers under s. 51 (i), as it was intended to, it does not create any repugnancy, since there remain within s. 51 (i) all laws tending to remove restrictions from inter-State commerce or regulating it without imposing restrictions on it. The Commonwealth is therefore equally bound with the States under s. 92. This interpretation of s. 92 is in accordance with the trend of reasoning of the majority of the High Court in all cases since *McArthur's* case (1), and in accordance with the reasoning in *James* v. *Cowan*. (2) The Dried Fruits Act here in suit offends against s. 92.

July 17. The judgment of their Lordships was delivered by

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(1) 28 C. L. R. 530.

(2) [1932] A. C. 542.

Lord Wright M.R. The appellant, Frederick Alexander James, is a grower and processor of dried fruits in the State of South Australia: his products have been for many years largely sold in various States, including New South Wales, Victoria, Western Australia and South Australia. In the action he claimed damages for the seizure by or on behalf of the respondents (Commonwealth) of (1.) 50 cases of dried fruits which he had shipped on a steamship in September, 1932, at Port Adelaide, consigned to E. D. Clarton for delivery at Sydney, New South Wales, in part performance of a contract of sale, and of (2.) 20 cases of dried fruits which he had shipped at Port Adelaide in October, 1932, consigned to H. Hooper & Co. for delivery at Sydney, New South Wales, in part performance of a contract. He further claimed a declaration that the Dried Fruits Act, 1928–35, of the Parliament of the Commonwealth contravenes s. 92 of the Constitution embodied in the Commonwealth of Australia Constitution Act, 1900 (hereinafter called "the Constitution") and is invalid, and that the Regulations made under the Dried Fruits Act, 1928–35, or some part thereof, are likewise invalid. He complained that under and in virtue of the Act and Regulations and a determination made thereunder, he had been prevented from sending his dried fruits out of South Australia in fulfilment of various inter-State contracts which he had made. The Commonwealth took out a summons to dismiss the claim as an abuse of the process of the Court in that the substantial questions had already been litigated between the parties and decided against the appellant in an action entitled *James* v. *The Commonwealth*. (1) The Commonwealth also demurred to the whole of the statement of claim on the grounds in law that the Dried Fruits Act, 1928–35, and the Dried Fruits (Inter-State Trade) Regulations are valid laws of the Commonwealth, and that the acts complained of were authorized by the Act or Regulations.

The summons and demurrer were heard together by the High Court of Australia. The summons was dismissed, and the Commonwealth does not appeal against that dismissal.

(1) No. 54 of 1928.

The demurrer, however, was allowed, and the action dismissed; it is from this that the present appeal is brought by special leave. The States of New South Wales, Queensland and Victoria have intervened in support of the contentions of the Commonwealth, while the States of Tasmania and Western Australia have intervened in support of the contentions of the appellant. The substantial question in this appeal, which is of great constitutional and commercial importance, is whether s. 92 of the Constitution binds the Commonwealth, and, if so, whether the Dried Fruits Act and Regulations contravene it.

Sect. 92 is in the following terms:—

"92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

"But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation."

The Dried Fruits Act, 1928–35, enacted by s. 3, sub-s. 1:—

"3.—(1.) Except as provided by the Regulations—

"(*a*) the owner or person having possession or custody of dried fruits shall not deliver any dried fruits to any person for carriage into or through another State to a place in Australia beyond the State in which the delivery is made; and

"(*b*) the owner or any other person shall not carry any dried fruits from a place in one State into or through another State to a place in Australia beyond the State in which the carriage begins,

unless he is the holder of a licence then in force, issued under this Act, authorising him so to deliver or carry such dried fruits, as the case may be, and the delivery or carriage is in accordance with the terms and conditions of that licence.

" Penalty : One hundred pounds or imprisonment for six months.

" (2.) Prescribed authorities may issue licences, for such periods and upon such terms and conditions as are prescribed, permitting the delivery of dried fruits to any person for carriage or the carriage of dried fruits from a place in one State to a place in Australia beyond that State.

" (3.) Any dried fruits which have been, or are in process of being, carried in contravention of this Act, shall be forfeited to the King."

There was also power to the prescribed authority to forfeit and cancel a licence, and the Governor-General was authorized to make, and has made, Regulations for giving effect to the Act. The relevant Regulations, Dried Fruits (Inter-State Trade) Regulations, in force at the material times provided that an owner's licence to export should be issued on the terms (inter alia) : " (ii) That the licensee shall export from Australia, or cause to be exported on his behalf, during the period for which his licence has been issued and during such further period as a prescribed authority considers necessary, such percentage of the dried fruits produced in Australia during any specified periods which came into the possession or custody of the licensee prior to the date of issue of his licence, or which come into the possession or custody of the licensee on and after the date of issue of this licence, as is from time to time fixed by the Minister, upon the report of a prescribed authority, and notified in the Gazette . . . ."

In accordance with the Act and Regulations the Commonwealth Minister of State for Commerce on February 20, 1935, determined that it should be a condition of the granting of a licence that the licensee should cause to be exported from Australia certain specified proportions of the Australian dried fruits possessed by him, varying from 60 to 90 per cent. according to the description of the fruit.

The appellant, contending that the Act and Regulations and the determination were invalid, refused to apply for a licence or undertake the prescribed conditions. In consequence his consignments were seized and forfeited, and the railway authorities and shipping companies to whom he tendered his dried fruits for carriage from the State of South Australia to other States refused to take them, in virtue of the prohibitions and penalties imposed under the Act by reason of the circumstance that the appellant had no licence.

The High Court in allowing the demurrer, did so because they could not hold that the Commonwealth was bound by s. 92 without departing from an opinion of the High Court given in 1920 in *W. & A. McArthur, Ld.* v. *State of Queensland* (1), that the Commonwealth was not bound by the section : at the same time Dixon, Evatt and McTiernan JJ. expressed their individual views to the contrary effect. Rich and Starke JJ. devoted their opinions rather to pointing out the difficulties that would attend a reconsideration of *McArthur's* case (1) than to an approval of the interpretation of s. 92 which it embodied. Starke J. said (2) : " The case has been acted upon so long that this Court should now treat the law as settled. Its review should be undertaken, if undertaken at all, by the Judicial Committee." It may, however, be noted that this particular question of the interpretation of s. 92 did not directly arise in *McArthur's* case (1) ; the Commonwealth was not a party and did not intervene in that case ; in the words of Rich J. (3) : " Until the present case, ... the question has not been presented to the Court for definitive judicial decision." But, as Starke J. points out, the question cannot be decided without a careful consideration of the true effect of s. 92 and of the numerous cases relating to State powers decided under that section. This is necessary because a principal, or, more precisely, the principal argument for the thesis maintained on behalf of the Commonwealth in this case is that s. 92, if applied to the Commonwealth, would practically nullify the express powers granted to the Commonwealth in s. 51 (i). It must at the outset be admitted that though the judgments in the High

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(1) 28 C. L. R. 530.

(2) (1935) 52 C. L. R. 589.

(3) 52 C. L. R. 585.

Court on s. 92 present a great, and perhaps embarrassing, wealth of experience, learning and ratiocination the decisions, and the various reasons which they embody, are not always easy to reconcile, and present considerable differences of judicial opinion. This can cause no surprise when the extreme difficulty and high importance of the questions are remembered. Before the matter is examined in detail, some general observations may be made.

The Constitution of the Commonwealth was, in the words of Lord Haldane, delivering the judgment of this Board in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ld.* (1), " federal in the strict sense of the term." He goes on to say that (2): " In a loose sense the word ' federal ' may be used, as it is there [i.e., in the British North America Act of 1867] used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions."

On the following page he adds (3): " In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future Constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against each other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great deliberation, and if there is at points obscurity in its language, this may be taken to be due not to any uncertainty as to the adoption of the stricter form of federal principle, but to

(1) [1914] A. C. 237, 252.
(2) Ibid. 253.
(3) Ibid. 254.

that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages."

The broad principle of this federal system is to be found as regards the States in particular, in s. 107, which provides: "107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

As regards the Commonwealth, s. 51 contains a list of 39 enumerated powers with which it is vested. Sect. 52 defines the cases in which the power of the Commonwealth is to be exclusive. Sect. 51 begins as follows: "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—" Then comes head (i), which is essentially material in this case: "Trade and commerce with other countries, and among the States." Other heads are "taxation; but so as not to discriminate between States or parts of States," bounties, postal, telegraphic, telephone and other like services, quarantine, currency, banking and insurance subject to limitations, bills of exchange, influx of criminals and a number of other powers. Thus the powers of the States were left unaffected by the Constitution except in so far as the contrary was expressly provided; subject to that each State remained sovereign within its own sphere. The powers of the State within those limits are as plenary as are the powers of the Commonwealth. Thus the State has the same power as the Commonwealth to legislate for the peace, order, and good government of the State with respect to inter-State trade, commerce and intercourse subject to the limitations of its territorial sovereignty and so far as s. 109, which provides that in the event of inconsistency between the law of the Commonwealth and of a State, the former shall prevail, does not apply.

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There are, however, certain sections of the Constitution which call for special mention as throwing light on ss. 51 and 92. Thus reference may be made to the sections dealing with customs and excise duties, in particular ss. 86 to 95, in the midst of which s. 92 is placed. It is well known that one of the objects which the federation sought to achieve was the abolition of restrictions on trade between the Colonies, and of the diversity in the different States of tariffs and border regulations; this was described as "the old inter-colonial trade war" (in *McArthur's* case (1)). Thus s. 86 provides that on the establishment of the Commonwealth the collection and control of duties of customs and excise shall pass to the Commonwealth; s. 87 deals with the disposal of the revenue as between Commonwealth and States; s. 88 provides that uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth; s. 90 provides that: "90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

"On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise."

Then s. 92, after the interposition of s. 91, which deals with bounties, follows. By s. 95 Western Australia was given a temporary and exceptional power to impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth, but such duties were to be collected by the Commonwealth. In addition to these sections may be noted s. 112, which gives a State power to levy on imports and exports, or on goods passing into or out of a State, such charges as may be

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(1) 28 C. L. R. 545.

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necessary for executing the inspection laws of the State; but these inspection laws are subject to be annulled by the Parliament of the Commonwealth, and the net produce of the charges is to be for the use of the Commonwealth.

Certain other sections must be read with s. 51 (i): thus s. 98 specifies that trade and commerce is to include navigation and State railways; s. 99 provides against any preference by the Commonwealth to any State in respect of trade, commerce or revenue; s. 100 forbids the Commonwealth by any law or regulation of trade or commerce, to abridge the use of waters of rivers, and ss. 101 to 104 deal with the constitution of an inter-State commission for the execution and maintenance of the provisions of the Constitution and of laws made thereunder relating to trade and commerce.

The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact, and the construction must hold a balance between all its parts. Though the question here is not as to the division of powers between Commonwealth and States, but as to the existence in the Commonwealth of the power which is impugned, yet it is appropriate to apply the words of Lord Selborne in *The Queen* v. *Burah* (1): "The established Courts of Justice, when a question arises [in regard to a Constitution] whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any

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(1) 3 App. Cas. 889, 904.

Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that "in interpreting a constituent or organic statute such as the Act [i.e., the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted": *British Coal Corporation* v. *The King.* (1) But that principle may not be helpful, where the section is, as s. 92 may seem to be, a constitutional guarantee of rights, analogous to the guarantee of religious freedom in s. 116, or of equal right of all residents in all States in s. 117. The true test must, as always, be the actual language used. Nor can any decisive help here be derived from evidence of extraneous facts existing at the date of the Act of 1900; such evidence may in some cases help to throw light on the intention of the framers of the statute, though that intention can in truth be ascertained only from the language used. But new and unanticipated conditions of fact arise. It may be that in 1900 the framers of the Constitution were thinking of border tariffs and restrictions in the ordinary sense, and desired to exclude difficulties of that nature, and to establish what was and still is called "free trade," and to abolish the barrier of the State boundaries so as to make Australia one single country. Thus they presumably did not anticipate those commercial and industrial difficulties which have in recent years led to marketing schemes and price control, or traffic regulations such as those for the co-ordination of rail and road services, to say nothing of new inventions, such as aviation or wireless. The problems, however, of the

(1) [1935] A. C. 500, 518.

Constitution can only be solved as they emerge by giving effect to the language used.

Before their Lordships proceed to the task of construction they may observe that they cannot shelter under the decision in *McArthur's* case (1), as the High Court felt they ought to do. The construction of s. 92 has recently been dealt with by this Board in *James* v. *Cowan* (2), where it was said (3): "At one time in the argument it was suggested that to determine the point it would be necessary to come to a conclusion on a matter which has been decided differently at different times by the High Court—namely, whether s. 92 applies to the Commonwealth as well as to the individual States. If to both, it was almost conceded that no question of limits inter se would arise. If to the States alone, then the violation of s. 92 would, it is said, amount to an invasion of Commonwealth powers which would involve a question under s. 74. Their Lordships, however, do not find it necessary to decide the question as to the application of s. 92, which will remain for them an open question. If the implied prohibition in s. 92 applies to both Commonwealth and States it would seem reasonably clear that there are no competing powers; the prohibited area is denied to both. But similarly, if the prohibition is addressed to the States alone, no question arises as to limits of powers between State and Commonwealth."

Hence the actual decision in that case does not throw light directly on the question before their Lordships in this appeal. This Board were there dealing with the effect of s. 92 in the special circumstances of that case; no doubt they were considering the section only as applying to the States, but the decision must be considered now, along with the various decisions in the High Court, in order to examine the argument that there is such an antinomy between s. 51 and s. 92 that they cannot both apply to the Commonwealth. The argument advanced on behalf of the respondent may be baldly thus expressed: trade and commerce mean the same thing in s. 51 (i) and in s. 92: the former section gives the

(1) 28 C. L. R. 530.

(2) [1932] A. C. 542.

(3) Ibid. 560.

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Commonwealth power to make laws with respect to inter-State trade and commerce: s. 92 enacts that inter-State trade and commerce are to be absolutely free: "absolutely free" means absolutely free from all governmental interference and control, whether legislative or executive: hence, it is said, there arises a direct and complete antinomy. The solution propounded has an attractive aspect of simplicity, but is it not merely illusory? Will it bear examination? Furthermore, the solution is not that s. 92 simply cancels s. 51 (i), but that s. 51 (i) overrides s. 92 so that the Commonwealth is unaffected by s. 92, though s. 51 (i) is prefaced by the words "subject to the Constitution," of which s. 92 is a part, and though the provision for absolute freedom of inter-State trade would obviously come to nothing, if the Commonwealth were unaffected by s. 92. The section on its face is not qualified or limited.

Before turning to the statute with the object of construing its language in order to settle the problem, it seems to be convenient to refer briefly to some of the decisions of the High Court and to the decision of the Judicial Committee in order to see if they support the theory that there is the complete antinomy or overlapping between the two sections which has been propounded. It will be remembered that these decisions deal with s. 92 as applied to the States, but they are helpful in seeking to ascertain what exactly s. 92 means.

In the decisions of the High Court on s. 92 a line is generally drawn at *McArthur's* case (1) in 1920. Before that case, the judges of the High Court (including Griffith C.J. and Isaacs, Barton and Gavan Duffy JJ.) referred to the question and stated expressly that it applied equally to Commonwealth and States: it was also incidentally observed that s. 92 left scope for the Commonwealth to act under s. 51 (i).

The first case to be noted is *Fox* v. *Robbins* (2), where it was held that a State law requiring a higher licence fee to be paid for selling wine manufactured from fruit grown in

(1) 28 C. L. R. 530.

(2) 8 C. L. R. 115.

another State was invalid under s. 92. "This provision," said Griffith C.J. (1), "would be quite illusory if a State could impose disabilities upon the sale of products of other States which are not imposed upon the sale of home products." The extra fiscal burden imposed on the imported products was clearly inconsistent with the absolute freedom of the border. In *Rex* v. *Smithers* (2) it was held that "intercourse" in s. 92 was not limited to commercial intercourse, and that the right of the people of Australia to cross a State line was not so restricted; Isaacs J. said (3): "In my opinion, the guarantee of inter-State freedom of transit and access for persons and property under s. 92 is absolute—that is, it is an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians." An Act prohibiting the entry into the State of ex-criminals from another State was held by Isaacs and Higgins JJ. to be invalid.

The three other cases before 1920 were not quite so simple. They dealt with war time State Acts for expropriating foodstuffs or for keeping them within the State. The first, *State of New South Wales* v. *The Commonwealth* (4), generally described as the *Wheat Case*, held that the Wheat Acquisition Act, 1914, of New South Wales, was not a contravention of s. 92; wheat had been expropriated under that Act, subject to compensation; contracts were to be cancelled so far as not completed by delivery: Isaacs J. thus summed up his opinion (5): "I am clearly of opinion that s. 92 has no such function, and that while neither States nor Commonwealth can detract from the absolute freedom of trade and commerce between Australian citizens in the property they possess, there is nothing to prevent either States or Commonwealth, for their own lawful purposes, from becoming themselves owners of that property and applying it, according to law, to the common welfare." Gavan Duffy J. said (6): "It is to be observed that s. 51 (i) of the Constitution enables Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to 'Trade and commerce with other countries, and among the States.' The words 'absolutely free' in s. 92 must, therefore, be subject to some limitation so as to give them a meaning which is consistent with the existence of this legislative power, and the meaning when ascertained must be the same always and in all conceivable circumstances; it must apply equally when we are considering the right of the Commonwealth to legislate under s. 51 (i) and of the States to legislate under s. 107."

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(1) 8 C. L. R. 119.
(2) (1912) 16 C. L. R. 99.
(3) Ibid. 117.
(4) (1915) 20 C. L. R. 54.
(5) Ibid. 101.
(6) Ibid. 104.

But this case, which has never been expressly overruled, was distinguished in *Foggitt, Jones & Co.* v. *State of New South Wales* (1), where it was held that an Act declaring that all stock and meat in the State should be kept at the disposal of the Government in aid of army supplies, was in breach of s. 92, because it prevented the transport of the stock across the border though the property in the stock was left in the owners. Soon afterwards, in *Duncan* v. *State of Queensland* (2), a different conclusion was arrived at by the majority of the Court on an Act not apparently distinguishable in its terms from the New South Wales Act; it was there said that the Act operated as "a dedication of the stock and meat to public purposes." (3) To the objection that the stock was removed from employment in inter-State trade, so that it could not be moved into another State, the answer was given that the real object of the Act was to conserve the stock and meat for the use of the Imperial forces.

The correctness of this last case may be questioned, and was indeed expressly dissented from in *McArthur's* case (4) by the majority of the Court; but what is clear is that in this and the preceding cases the High Court were concerned with the question of freedom in passing the State borders. It might well be said that that freedom was not affected by a requisition, but was affected by a measure which prevented the taking of goods across the border into another State.

(1) 21 C. L. R. 357.
(2) (1916) 22 C. L. R. 556.
(3) Ibid. 577.
(4) 28 C. L. R. 530.

Then came *McArthur's* case (1), which introduced a new conception. The question there was not limited to the question of freedom from restriction or burden or impost because of or in respect of actual or prospective passing from State to State. The freedom claimed and admitted was freedom from all governmental control extending over the whole of any transaction which is treated as having the characteristic of inter-State commerce. This is something which goes beyond the mere act of transportation over the territorial frontier. "All the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, continue and effectuate the movement of persons and things from State to State are also parts of the concept, because they are essential for accomplishing the acknowledged end. (2)" "Absolutely free" means, so the majority of the Court held, free from all governmental control by every governmental authority to whom the command contained in the section is addressed, that is, as trade and commerce and intercourse. But liberty, it is conceded, is not equivalent to anarchy or licence. The analogy of free speech was adduced as an instance in which freedom was reconciled with law. But this wide conception of the freedom given under s. 92, if applied to the Commonwealth, would, so the judgment proceeded, practically nullify s. 51 (i) and render impossible various Commonwealth Acts, so far as they relate to inter-State transactions, such as the Australian Industries Preservation Act, and others; hence the conclusion was reached that s. 92 cannot apply to the Commonwealth. The Act in question in that case was the Queensland Profiteering Prevention Act, 1920, which made it unlawful for any trader in the State, whether as principal or agent, to sell goods at prices higher than the prices declared: the issue was whether agents for the plaintiffs, a Sydney firm, were committing a breach by selling in the State, at prices higher than the prescribed prices, goods of the plaintiffs to be despatched from Sydney and delivered to the purchasers in the State. It was held that the Act was invalid as contravening s. 92: in other words the protection of s. 92 was taken to extend over the whole of the transaction until the sale was completed by delivery. There was no prevention or hindrance under the Act in respect of the passage of goods from State to State; the law applied equally to all goods sold in the State whether or not they came across the border; there was no discrimination against the plaintiff's goods; rather there was discrimination in favour of them: they were held to fall into a class of privileged goods. It was said the prices might be so fixed as to place the sellers from the adjoining States at a disadvantage and have the same effect as a customs duty or bounty. But nothing of the sort was suggested to be in fact the case; on the contrary it seems these sellers had a preference. In truth the decision deprived Queensland of its sovereign right to regulate its internal prices.

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(1) 28 C. L. R. 530.

(2) Ibid. 549.

Thus the theory that s. 92 did not bind the Commonwealth came into existence twenty years after the Commonwealth Act and as a corollary to a new construction of s. 92.

Reference may now be made to later cases in which this idea appears to have been departed from. In *Roughley* v. *New South Wales* (1) the validity of the Farm Produce Agents Act, 1926 (N. S. W.) was attacked. That Act made it an offence for any person in the State to act as a farm produce agent unless licensed by the State; it required a farm produce agent to produce accounts and obey various other regulations. The question was whether that Act could legally be applied to agents selling for principals in other States who sent their goods to Sydney for sale; it was claimed that the Act was invalid because it infringed s. 92 as interfering with the freedom enacted by that section. That claim was rejected by the majority of the Court (Starke J. dissenting), on the ground that the agents' operations were purely intra-State or domestic, and constituted a separate business, distinct from that of their principals. But Isaacs J., consistently with *McArthur's* case, said (2): "All agency is forbidden in the nature of farm produce agency, except as prescribed.

(1) 42 C. L. R. 162.

(2) Ibid. 185.

Therefore, agency as a part, and in many cases an essential part, of inter-State trade is included. That is patently an infringement of s. 92."

In this connection it is convenient to pass at once, returning later to certain intervening cases, to an important series of cases, of which *The King* v. *Vizzard* (1) affords the best example. The question in that case was whether the State Transport (Co-ordination) Act, 1931 (N. S. W.), contravened s. 92. That Act provided that no public motor vehicle should be operated in the State unless it was licensed; a Board was established with wide powers to grant or refuse licences and also to impose conditions; a licence fee was to be paid. For various reasons, in particular the heavy State expenditure on railways and roads, the problem of co-ordinating railway and road services had become of great national importance. The appellant's motor lorry was a commercial vehicle used for the conveyance of goods from Melbourne to a place in New South Wales. It was not licensed, with the result that the driver was convicted under the Act. He appealed on the ground that the Act was invalid because it contravened s. 92. Gavan Duffy C.J., Rich, Evatt and McTiernan JJ. held it did not. Starke and Dixon JJ. dissented. The validity of the two propositions laid down in *McArthur's* case (2) was there for the first time formally challenged. The Commonwealth had intervened, and on their behalf that distinguished constitutional lawyer, Sir Robert Garran K.C., submitted that within the limits to which s. 92 should be confined, it bound the Commonwealth, and that the ruling in *McArthur's* case (2) was wrong. Gavan Duffy C.J., Evatt and McTiernan JJ. agreed with this argument in principle, though Gavan Duffy C.J. thought it unnecessary that there should be an express decision by his casting vote. The elaborate judgment of Evatt J. in that case is of great importance. It is impossible to quote here at length from it; one short passage may be extracted (3): "Sect. 92 does not guarantee that, in each and every part of

(1) 50 C. L. R. 30.
(2) 28 C. L. R. 530.
(3) 50 C. L. R. 94.

a transaction which includes the inter-State carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent contractor co-operating in the delivery and marketing of the commodities, and each of his servants and agents, possesses, until delivery and marketing are completed, a right to ignore State transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities." Evatt J. points out that *Roughley's* case (1) is in truth inconsistent with what was laid down in *McArthur's* case. (2) If this reasoning, which in *Vizzard's* case (3) was primarily applied to the States, is, as it seems to be, correct, then in principle it applies mutatis mutandis to the Commonwealth's powers under s. 51 (i) and shows that s. 51 (i) has a wider range than that covered by s. 92.

Vizzard's case (3) was followed in *O. Gilpin, Ld.* v. *Commissioner for Road Transport and Tramways* (*N. S. W.*). (4) A similar case had been *Willard* v. *Rawson*. (5)

James v. *Cowan* (6) had by that time been decided by this Board. That authority dealt with Dried Fruits legislation enacted by the State of South Australia: His Majesty in Council reversed the decision of the High Court, preferring the dissenting judgment of Isaacs J., and held that the State Act, which gave to the State powers of compulsory acquisition, and the orders and seizures made under it, were invalid as contravening s. 92. The Board held that the Act in question, partly by reason of its actual provisions, partly by reason of its admitted object, was tantamount to a prohibition of export: Lord Atkin said in reference to the powers of expropriation (7): "If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the

(1) 42 C. L. R. 162.
(2) 28 C. L. R. 530.
(3) 50 C. L. R. 30.
(4) 52 C. L. R. 189.
(5) 48 C. L. R. 316.
(6) [1932] A. C. 542.
(7) Ibid. 558.

legislature itself had imposed the commercial restrictions." He added: "It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected."

The importance of this decision for the present purpose is that the test there adopted was whether the object of the Act was to prevent "the sale of the balance of the output in Australia (1)"; the Act was directed "against selling to any of the States" in Lord Atkin's words; so regarded, the case is simply that of a restriction or prohibition of export from State to State, which necessarily involves an interference with the absolute freedom of trade among the States. The Board found it unnecessary to undertake the difficult task of defining the precise boundaries of the absolute freedom granted to inter-State commerce by s. 92.

James v. *Cowan* (2) was followed and applied by the High Court (Evatt J. dissenting) in *Peanut Board* v. *Rockhampton Harbour Board* (3), in which the *Wheat Case* (4) was distinguished. The producers of the peanuts, it was held, were prevented by the Act from engaging in inter-State and other trade in the commodity. The Act embodied, so the majority of the Court held, a compulsory marketing scheme, entirely restrictive of any freedom of action on the part of the producers; it involved a compulsory regulation and control of all trade, domestic, inter-State and foreign; on the basis of that view, the principles laid down by this Board were applied by the Court.

There are only a few other cases to which their Lordships desire to refer. *Vacuum Oil Co. Pty., Ld.* v. *Queensland* (5) was a case in which it was held that a burden placed (in substance) on the first seller in the State of imported petroleum, was in truth, though not in form, a sort of tax or impost; so regarded, it clearly infringed s. 92, though its operation and incidence only took effect at an interval after the border was passed.

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(1) [1932] A. C. 559.
(2) Ibid. 542.
(3) 48 C. L. R. 266.
(4) 20 C. L. R. 54.
(5) (1934) 51 C. L. R. 108.

The earlier case of *Ex parte Nelson* [*No.* 1] (1) may be contrasted with the case of *Tasmania* v. *Victoria*. (2) In the latter case the validity of a Victorian proclamation was attacked: the proclamation absolutely prohibited the importation into Victoria of potatoes from Tasmania: it was held to be invalid not only because it was unauthorized by the State Act under which it purported to be made, but because it contravened s. 92; it directly and absolutely put an end to the trade in potatoes between those States. It was said in the judgment of Gavan Duffy C.J., Evatt and McTiernan JJ. (3): " In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed." In *Nelson's* case (1) the Act authorized the proclamation prohibiting, or more correctly restricting, the introduction into the State of cattle from a district in another State in which there was reason to believe infectious or contagious disease in stock existed. The High Court was equally divided; the view which prevailed that the Act was valid seems to have been based on the ground that the true nature of the legislation was not to restrict freedom of inter-State commerce, but to protect the flocks and herds of New South Wales against contagious and infectious diseases. This view was disputed by the three judges who dissented. In *Tasmania* v. *Victoria* (2) some of the judges in that case also questioned the correctness of that view while upholding the actual decision on other grounds. It is certainly difficult to read into the express words of s. 92 an implied limitation

(1) 42 C. L. R. 209.
(2) (1934-5) 52 C. L. R. 157.
(3) Ibid. 168.

based on public policy. It is true that once the cattle or goods have crossed the border, they become liable to inspection under s. 112, and also to the State laws of health and sanitation ; that circumstance may render the difficulty of principle less important practically. But the question whether in proper cases the maxim "salus populi est suprema lex" could be taken to override s. 92 is one of great complexity. Their Lordships in this case will accordingly follow the example set by this Board in *James* v. *Cowan* (1) and treat the question as reserved until it arises, if it ever does.

This survey of the cases, inevitably brief and incomplete as it is, has been undertaken simply in order to show that the propositions laid down in *McArthur's* case (2), which are the foundation of the respondent's argument that s. 92 does not bind the Commonwealth, were not merely novel when first enunciated, but have not been applied by the High Court in practice in subsequent decisions, though re-affirmed from time to time in dissenting judgments.

Before their Lordships proceed to construe the relevant sections of the Constitution, they desire to notice the argument that certain Federal statutes have been enacted on the assumption that s. 92 does not bind the Commonwealth. The Post and Telegraph Act, 1901–1923, contains a great number of detailed regulations with reference to the posting, stamping, delivery and so forth of letters, the transmission of telegrams, etc., including inter-State intercourse. But if freedom is understood in a certain sense, all these matters come within the powers given by s. 51 (i) and (v) to make laws with respect to trade and commerce and postal and other services. Sect. 98 of the Act calls for special notice : it forbids and makes it an offence, subject to specified exceptions, to send or carry a letter for reward otherwise than by post. As this provision applies to inter-State as well as intra-State correspondence, it is in one sense a limitation on freedom of intercourse, assuming that term to include correspondence, and it may thus be regarded as an interference

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(1) [1932] A. C. 542.

(2) 28 C. L. R. 530.

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with trade. Whether that be so or not, it is, however, a limitation notoriously existing in ordinary usage in all modern civilized communities; it does not impede freedom of correspondence, but merely, as it were, canalizes its course, just as "free speech" is limited by well known rules of law. Very much the same is true of the Wireless Telegraphy Act, 1905. Nor can it be fairly said that the Secret Commissions Act, 1905, interferes with freedom of commerce in any sense in which that term is properly used. It forbids, irrespective of any State boundary, objectionable trade practices in inter-State trade. It merely illustrates how the Commonwealth can make laws under s. 51 (i) with respect to inter-State trade and commerce without infringing s. 92. The same is true of the Commerce (Trade Descriptions) Act, 1905–1933, which is merely directed to a special form of falsification. The Australian Industries Preservation Act, 1906–1930, is for the repression of destructive monopolies, and is aimed at preventing illegitimate methods of trading. Similarly the Sea Carriage of Goods Act, 1924, which, following the British Act, adopts the Hague Rules, and requires that any bill of lading to which the Act applies must either in fact conform to, or must be deemed to conform to, the conditions embodied in these Rules, does not even render compulsory the issue of a bill of lading; it merely says that if the parties choose to have a bill of lading it must contain, or be deemed to contain, the prescribed stipulations. The Transport Workers Act, 1928–29, was discussed in *Huddart Parker, Ld.* v. *Commonwealth* (1), where the validity of Regulations made under the Act was upheld, the point raised being whether the matter fell within the Commonwealth powers under s. 51 (i). Sect. 92 was not discussed, because it was assumed that s. 92 did not apply to the Commonwealth. Indeed, as already stated, the question whether s. 92 applied to the Commonwealth has never been the subject of decision in any case until the present. In the same way *James* v. *The Commonwealth* (2) was decided on other grounds, it being assumed that s. 92 did not bind the Commonwealth. In the Transport

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(1) 44 C. L. R. 492.

(2) (1928) 41 C. L. R. 442.

Workers Act, as in the other like statutes, which need not be further enumerated or discussed here, there was no question of interference with freedom in passing across the State borders; they merely illustrate the width of the powers given by s. 51 (i). On the other hand, the Dairy Produce Act, 1933–1935, raises exactly the same issue as that raised in this case in respect of the Dried Fruits Act, 1928–1935.

It is now convenient to examine the actual language of the Constitution so far as relevant, in order to ascertain its true construction. The first question is what is meant by "absolutely free" in s. 92. It may be that the word "absolutely" adds nothing. The trade is either free or it is not free. "Absolutely" may perhaps be regarded as merely inserted to add emphasis. The expression "absolutely free" is generally described as popular or rhetorical. On the other hand, "absolutely" may have been added with the object of excluding the risk of partial or veiled infringements. In any case, the use of the language involves the fallacy that a word completely general and undefined is most effective. A good draftsman would realize that the mere generality of the word must compel limitation in its interpretation. "Free" in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law, as was pointed out in *McArthur's* case. (1) Free love, on the contrary, means licence or libertinage, though, even so, there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to any one who comes, subject, however, to his condition or behaviour not being objectionable. Free trade means, in ordinary parlance, freedom from tariffs.

"Free" in s. 92 cannot be limited to freedom in the last mentioned sense. There may at first sight appear to be some plausibility in that idea, because of the starting-point

(1) 28 C. L. R. 530.

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in time specified in the section, because of the sections which surround s. 92, and because the proviso to s. 92 relates to customs duties. But it is clear that much more is included in the term; customs duties and other like matters constitute a merely pecuniary burden; there may be different and perhaps more drastic ways of interfering with freedom, as by restriction or partial or complete prohibition of passing into or out of the State.

Nor does " free " necessarily connote absence of discrimination between inter-State and intra-State trade. No doubt conditions restrictive of freedom of trade among the States will frequently involve a discrimination; but that is not essential or decisive. An Act may contravene s. 92 though it operates in restriction both of intra-State and of inter-State trade. A compulsory seizure of goods, such as that in *James* v. *Cowan* (1), may include indifferently goods intended for intra-State trade and goods intended for trade among the States. Nor can freedom be limited to freedom from legislative control; it must equally include executive control.

Then there is the conception enunciated in *McArthur's* case (2) that " free " means free from every sort of impediment or control by any organ of Government, legislature or executive to which s. 92 is addressed with respect to trade, commerce or intercourse, considered as trade, commerce and intercourse. The scope of this view has already been indicated. It involves a conception of inter-State trade, commerce and intercourse commencing at whatever stage in the State of origin the operation can be said to begin, and continuing until the moment in the other State when the operation of inter-State trade can be said to end: the freedom is postulated as attaching to every step in the sequence of events from first to last. Now it is true that for purposes of s. 51 (i), the legislative powers of the Commonwealth may attach to the whole series of operations which constitute the trade in question, once it has fallen into the category of inter-State trade; hence the various Acts to some of which reference has been made here. But when it is sought to apply this to s. 92, difficulties at once arise. It seems in practice only to have been so applied in *McArthur's* case (1), and it is doubtful if it was so applied even there, but it has been rejected in *Roughley's* case (2) and in *Vizzard's* case (3) and the other transport cases. But even in *McArthur's* case (1) it was recognized that such freedom was qualified; the analogue of freedom of speech was there taken, but it has already been explained what limitations that involves. Nor is help to be derived from speaking of freedom of trade as trade: as well speak of freedom of speech as speech. Every step in the series of operations which constitute the particular transaction is an act of trade; and control under the State law of any of these steps must be an interference with its freedom as trade. If the transaction is one of sale, it is governed at every stage, from making the contract, until delivery—by the relevant Sale of Goods Act. If it is a bill of exchange, similarly the Bills of Exchange Act applies. If it involves sea, railway or motor carriage, relevant Acts operate on it; it is subject to executive or legislative measures of State or Commonwealth dealing with wharves or warehouses or transport workers. It must be so subject. Otherwise the absurd result would follow that the inter-State operation of trade would be immune from the laws of either State, of the State of origin equally with the other State. There would thus be in every State a class of dealings and acts entirely immune from the general law of the State, though only distinguishable from other like dealings and acts by the fact that they are parts of an inter-State transaction. It is to avoid this paradox that it was said that the gap can only be filled up by the Commonwealth—a point for the moment reserved.

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(1) [1932] A. C. 542.

(2) 28 C. L. R. 530.

But if freedom is to be found in practice the line must be drawn somewhere. If no help is to be got from the formula "trade and commerce as such," neither can it be found by saying that freedom under s. 92 is applied to acts not

(1) 28 C. L. R. 530.

(2) 42 C. L. R. 162.

(3) 50 C. L. R. 30.

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persons. For instance, it is said, a man may be arrested for crime while about to cross the frontier in the course of a trade operation, and that is no infringement of s. 92. That is true enough, but not very helpful: trade no doubt consists of acts (including documents), but acts imply persons who perform or create them even if only to work the necessary machines. Nor is much help to be got by reflecting that trade may still be free, though the trader has to pay for the different operations, such as tolls, railway rates, freight and so forth. Nor has it been suggested that s. 92 bars the seller's ordinary right of stoppage in transitu if the sale is inter-State.

If no definite delimitation of the relevant idea of freedom is to be derived from these considerations, in particular, if the formula freedom of trade "as such" is not sufficient, where is the line to be drawn, and where is the necessary delimitation to be found? The true criterion seems to be that what is meant is freedom as at the frontier or, to use the words of s. 112, in respect of "goods passing into or out of the State." What is meant by that needs explanation. The idea starts with the admitted fact that federation in Australia was intended (inter alia) to abolish the frontiers between the different States and create one Australia. That conception involved freedom from customs duties, imports, border prohibitions and restrictions of every kind: the people of Australia were to be free to trade with each other, and to pass to and fro among the States, without any burden, hindrance or restriction based merely on the fact that they were not members of the same State. But it has become clear from the various decisions already cited that such burdens and hindrances may take diverse forms, and indeed appear under various disguises. One form may be a compulsory acquisition of goods, as in *James* v. *Cowan* (1), or the *Peanut* case (2), if in truth the expropriation is directed wholly or partially against inter-State trade in the goods, that is, against selling them out of the State. Another form may be that of placing a special burden on the goods in the

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(1) [1932] A. C. 542.

(2) 48 C. L. R. 266.

State to which they have come, simply because they have come from the other State, as in the *Vacuum Oil* case (1): more obvious cases are those of undisguised restrictions on passing from State to State. The actual restraint or burden may operate while the goods are still in the State of origin, as in the case of a compulsory expropriation or a standstill order, or it may operate after they have arrived in the other State, as in the *Vacuum Oil* case. (1) [In every case it must be a question of fact whether there is an interference with this freedom of passage. Their Lordships are of opinion that this construction is not inconsistent with any decided case, with the doubtful exception of *McArthur's* case. (2) As a matter of actual language, freedom in s. 92 must be somehow limited, and the only limitation which emerges from the context, and which can logically and realistically be applied, is freedom at what is the crucial point in inter-State trade, that is at the State barrier]

This construction also makes s. 51 (i) consistent with s. 92, so far as concerns the Commonwealth, which in their Lordships' judgment, as they will now state, is bound by s. 92 equally with the States. So far as the language of the section goes, no countenance is afforded for the contrary view. The language is quite general. It is in terms not subject to any exception or limitation. It is the declaration of a guaranteed right; it would be worthless if the Commonwealth was completely immune and could disregard it by legislative or executive act. It is difficult, if not impossible, to conceive that any one drafting a statute, especially an organic statute like the Constitution, would have written out s. 92 in its present form, if what was intended was a constitutional guarantee limited to the States but ineffective so far as regards the Commonwealth. Sect. 92 is found in a series of sections which deal both with the Commonwealth and the States: indeed the proviso to s. 92 directly applies to the Commonwealth. The Constitution, when it is enacting a section which is only to apply either to the Commonwealth or to the States exclusively, indicates that intention in clear terms, as in ss. 98, 99, 100, 102, 116, which specifically relate to the Commonwealth, and ss. 111, 112, 113, 114 and 115. It is true that there are certain sections which deal specifically with the trade and commerce power of the Commonwealth, in particular ss. 98, 99, 100, though these sections do not either individually or collectively cover the same ground as s. 92; there are also other sections which relate specifically to the trade powers of the States, in particular s. 112 (inspection laws) and s. 113 (liquor laws). None of these sections, however, directly help in the construction of s. 92.

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(1) 51 C. L. R. 108. (2) 28 C. L. R. 530.

The real argument on which the theory is based that s. 92 does not bind the Commonwealth is that s. 92 if it applied to the Commonwealth would nullify, or practically nullify, s. 51 (i). If that were so, the same would be true of various other heads in s. 51. That was the theory expounded in *McArthur's* case. (1) Their Lordships have explained why they reject that theory. They will only add a few observations. One is that though trade and commerce mean the same thing in s. 92 as in s. 51 (i), they do not cover the same area, because s. 92 is limited to a narrower context by the word "free"; the critical test of the scope of s. 92 is to ascertain what is meant by "free"; their Lordships have sufficiently stated, and will not repeat, their opinion on that point. But if that theory enunciated in *McArthur's* case (1) fails, the only substantial argument for the respondent's contention fails. It may further be observed in reference to the contention that there is antinomy between s. 92 and s. 51 (i), that the same antinomy would arise between s. 92 and s. 107. By s. 107 every State power is saved, unless it is exclusively vested in the Commonwealth or withdrawn from the Parliament of the State. Sect. 51 (i) does not give exclusive powers to the Commonwealth. Each State has therefore the full power, except where s. 109 applies, to interfere with inter-State freedom, within its own territory and at its border; hence, if s. 92 were construed as the respondent contends, there would be exactly the same antinomy in regard to the States; the only difference would be that s. 51 (i) is express;

(1) 28 C. L. R. 530.

but that is immaterial, because both s. 51 (i) and s. 107 are expressly subject to the Constitution, and the latter section imports every State power as fully as if specifically set out, whereas the Commonwealth only possesses powers expressly conferred. There could be no question in regard to the Commonwealth of powers withdrawn.

For these reasons their Lordships are of opinion that s. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the Dried Fruits Act, 1928–35, must be held to be invalid. On the interpretation of "free" in s. 92, the Acts and the Regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State trade. Indeed, the contrary was but faintly contended if the Commonwealth were held to be bound by the section. The conclusion of the matter is that in their Lordships' judgment s. 92 applies to the Commonwealth and that being so, the Dried Fruits Act and Regulations should be declared invalid as contravening s. 92.

The result is that in their Lordships' judgment the Commonwealth should be held to have failed in its attempt by the method adopted under the Act in question to control prices and establish a marketing system, even though the Commonwealth Government are satisfied that such a policy is in the best interests of the Australian people. Such a result cannot fail to cause regrets. But these inconveniences are liable to flow from a written Constitution. Their Lordships cannot arrive at any conclusion save that they could not give effect to the respondent's contention consistently with any construction of the Constitution which is in accord with sound principles of interpretation. To give that effect would amount to re-writing, not to construing, the Constitution. That is not their Lordships' function. The Constitution, including s. 92, embodied the will of the people of Australia, and can only be altered by the will of the people of Australia expressed according to the provisions of s. 128.

Though their Lordships are reversing the decision of the High Court, they do so with the greatest respect for the opinions of the distinguished judges who have thought differently, and they do so with peculiar diffidence and reluctance on a constitutional matter. They have, however, the consolation that they are giving effect to the declared opinion of three of the five judges of the High Court who sat in this case, while the other two seemed to indicate that their individual opinions tended the same way. But all five judges thought they should follow what had been regarded as the law in the High Court for many years, and leave its reconsideration to the Judicial Committee, where, as stated in *James* v. *Cowan* (1), it was an open question, and must here be dealt with on that footing.

Their Lordships wish to express their appreciation of the help given to them by the counsel who have argued in this appeal, in particular the Attorney-General for the Commonwealth, the merit of whose admirable argument is in no way diminished because it has not succeeded.

In the result the appeal in their Lordships' judgment should be allowed, the demurrer should be overruled and the matter remitted for trial to the High Court. The respondent should pay the appellant's costs and bear its own costs of the hearing below and of this appeal. The interveners will bear their own costs.

Their Lordships will humbly so advise His Majesty.

Solicitors for appellant: *Justice & Pattenden.*

Solicitors for Commonwealth of Australia: *Coward, Chance & Co.*

Solicitors for States of New South Wales and Queensland: *Light & Fulton.*

Solicitors for State of Victoria: *Freshfields, Leese & Munns.*

Solicitors for States of Tasmania and Western Australia: *Galbraith & Best.*

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(1) [1932] A. C. 542.

[PRIVY COUNCIL.]

BROWNE . . . . APPELLANT ;

AND

MOODY AND OTHERS . . . . . . RESPONDENTS.

J. C.*
1936
July 27.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Will—Construction—Direction to pay income of fund to beneficiary during his lifetime—Fund to be divided amongst named persons on his death—No direct words of gift either of life interest or of capital—No condition personal to remaindermen—Capital vested in them a morte testatoris.

A testatrix, who was survived by a son, three married daughters and a grand-daughter, the daughter of her son, by cl. 5 of her will gave directions that the income arising from an invested fund of $100,000.00 " is to be paid to my said son during his lifetime . . . . On the death of my said son . . . . I direct that the said fund of $100,000.00 is to be divided as follows : One half of the said fund to my grand-daughter, ... and the remainder of the said fund to be divided equally between my daughters . . . . share and share alike." She further directed, by cl. 7, that : " In the event of my grand-daughter . . . . or any of my said daughters predeceasing me or predeceasing my said son leaving issue . . . . the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived " :—

Held, first, that the legacies directed by cl. 5 to be paid to the grand-daughter and the three daughters upon the death of the life tenant, the son, became vested upon the death of the testatrix. The date of the division of the capital of the fund was a dies certus—the date of the death of the son—and the direction to divide the capital among the named beneficiaries at that date was not accompanied by any condition personal to the beneficiaries. Where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place a morte testatoris in the remaindermen.

Dicta of Sir William Page Wood V.-C. in *In re Bennett's Trust* (1857) 3 K. & J. 280, 283, approved.

Held, secondly, that the contingency of predeceasing " leaving issue " in cl. 7 prevented the vesting from being absolute, and that

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* *Present :* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ALNESS, and SIR MICHAEL MYERS.

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the legacies were liable to be divested in the case of any legatee who predeceased the son of the testatrix leaving issue.

Judgment of the Supreme Court of Canada [1934] S. C. R. 324 reversed.

APPEAL (No. 52 of 1936) from a judgment of the Supreme Court of Canada (March 6, 1934), affirming a judgment of the High Court for Ontario (March 25, 1933).

The testatrix, Mrs. Katherine Hamilton Browne, who died on March 17, 1930, by cl. 5 of her will, dated December 16, 1929, directed that the income arising from a fund of $100,000.00 invested in the name of E. H. Watt should be paid to her son, William George Hamilton Browne, during his lifetime, and that " on the death of my said son . . . . I direct that the said fund of $100,000.00 is to be divided as follows : One half . . . . to my grand-daughter Enid Browne, daughter of my son . . . . and the remainder of the said fund to be divided equally between my daughters Florence Yoda Moody, ... Constance Emma Kinnear, ... and Helen Smith, ... share and share alike." By cl. 7 of her will : " In the event of my grand-daughter Enid Browne or any of my said daughters predeceasing me or predeceasing my said son leaving issue I direct that the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived."

The question in the appeal was whether the grand-daughter (the appellant) and the three daughters of the testatrix (respondents) took vested interests in the fund of $100,000.00 on the death of the testatrix, and if so whether or not the legacy of any of them was liable to be divested under or otherwise affected by cl. 7 of the will.

The relevant clauses of the will and the two questions submitted to the Supreme Court in the special case appear from the judgment of the Judicial Committee.

The High Court for Ontario declared that the grand-daughter and the daughters did not take vested interests in the fund on the death of the testatrix. Rose C.J., holding that he was " unable to find anything in the will to distinguish the gifts to the grand-daughter and the daughters from the gifts in

Re Gilmour (1) and *Re Gaukel* (2), which were held to be covered by the rule stated in *Busch* v. *Eastern Trust Co.* (3)" said that it was not open to him to depart from the rule as stated in the above mentioned cases.

On appeal the Supreme Court of Canada (Duff C.J.C., Rinfret, Smith, Cannon and Hughes JJ.) affirmed the judgment of the High Court for Ontario. The judgment of the Supreme Court, delivered by Rinfret J., is reported at [1934] S. C. R. 324.

1936. July 9. *Radcliffe K.C.* and *A. J. Russell Snow K.C.* for the appellant. The first question is whether certain reversionary legacies, i.e., legacies subject to the right of another person to enjoy the income before they fell into possession, vested at the death of the testatrix, or whether vesting was postponed until the death of the life tenant. The Supreme Court of Canada, in deciding the way they have, have gone away from a very well established rule which is to be found in a number of early authorities and in all the recognized text-books—namely, that if the payment of the legacy is deferred only for the convenience of the estate and not for any reasons personal to the legatees themselves, such as the attainment of a specified age, then it is not right to hold that the vesting is deferred until the period of distribution, but the legacies must be treated as vested from the date of the death of the testator. It was the duty of the executors to hold the investment on the trusts of the will. Rinfret J. has treated the direction in cl. 5 of the will as being a direction not to the executors, as it clearly was and must be—see s. 2 of the Ontario Devolution of Estates Act, 1927 R. S. O. c. 148 —but to Mr. Watt himself. There is no inference of a wish to postpone vesting to be drawn. The grounds given for the view of the Supreme Court are not satisfactory. [Reference was made to *Busch* v. *Eastern Trust Co.* (3); to *Re McFarlane* (4), where Middleton J.A. cited (5) from the judgment of Sir

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(1) (1932) 41 O. W. N. 34.
(2) Ibid. 214, 365.
(3) [1928] S. C. R. 479.
(4) [1934] O. R. 383.
(5) Ibid. 388.

W. Page Wood V.-C. in *In re Bennett's Trust* (1); and to Williams on Executors, 12th ed., vol. ii, pp. 790, 794, and 795.] It is stated at p. 800: "Where a person bequeaths a sum of money or other personal estate to one for life, and after his decease to another, the interest of the second legatee is vested: . . . ." Jarman on Wills, 7th ed., vol. ii, under "Vesting of Bequests of Personalty" at pp. 1376–7, deals directly with this point: "If the payment or distribution is deferred not merely (as in the cases just noted) until the lapse of a definite interval of time, which will certainly arrive, but until an event which may or may not happen, the effect, it should seem, is to render the legacy itself contingent. . . . (1377) But even though there be no other gift than in the direction to pay or distribute in futuro; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question." That is exactly this case. [Reference was made to *Leeming* v. *Sherratt* (2) and *Packham* v. *Gregory*. (3)]

[LORD MACMILLAN referred to *Bowman* v. *Bowman*. (4)]

Even if the legatees have got vested interests on the death of the testatrix, the question remains whether they have not to wait until the tenant for life dies to see whether, if one of them has died by that date leaving issue, her share has not been given to her issue instead of belonging to her estate. Clause 7 of the will is wholly ambiguous, because it is not appropriate in terms to cl. 5 at all. Clause 7 does not operate to defeat the vested interests of the legatees, because they all survived the testatrix, and consequently the legacies became vested in them and cannot be divested by subsequent inconsistent and repugnant dispositions made thereof by the testatrix. The dominant object of the testatrix's bounty and intention was to benefit her grand-daughter and daughters solely. The point is whether it is possible, to prevent cl. 7 from cutting down the vested interest that has been given, to read "or" as "and" in the clause—predeceasing me

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(1) 3 K. & J. 280, 282.

(2) (1842) 2 Hare, 14, 17.

(3) (1845) 4 Hare, 396.

(4) [1899] A. C. 518.

" and " predeceasing my son. The real meaning of cl. 7 is that the testatrix was saying that whatever interest any of my daughters has been given in cl. 5 or cl. 6, and which they would have lost by predeceasing me or my son in the case of cl. 5, I want their issue to have. [Reference was also made to *In re Duke. Hannah* v. *Duke.* (1)]

A. W. Roebuck K.C., A.-G. for Ontario, *McGregor Young K.C.* and *G. P. Slade* for the Official Guardian, appearing in support of the possible interests of the various children, born and unborn, of the legatees. The will is a composite matter and there is no one factor which can be relied upon, and no stereotyped rule which applies to the circumstances of this will. Rinfret J. in the Supreme Court's judgment puts the case with regard to non-vesting until the death of the life tenant on the strongest ground. Prima facie interests in a fund given by means of a direction to divide at a future period do not vest until that period. In this instance there is no present gift: in Canadian decisions the fact that there was no present gift was considered of importance in arriving at a conclusion of non-vesting, not conclusive, but important in bringing about that decision. [Reference was made to *Busch* v. *Eastern Trust Co.* (2); *Re Gaukel* (3); and *Re Gilmour.* (4)] In all of those cases the fact that there was no present gift seems to have influenced the judges in greater or less degree in coming to the decision that there was no vesting until the termination of the life estate. The other points are, a direction to divide, and the contrast between the gift of one portion of the estate and the direction to divide up the other portion.

In Williams on Executors, 11th ed., vol. ii. p. 981; 12th ed., vol. ii. p. 795, it is stated: " Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer ' from and after ' a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected." That is not a positive rule, it is open to qualification, but it is a point in my favour. The direction to divide is referred to in the *Busch* case (1), and is one of the reasons why it was held that there was no vesting. The fact that there is no gift over in substitution has been looked upon variously, but it is considered in the majority of cases as pointing in the direction of non-vesting. The present are not vested gifts transmissible to the legatees' personal representatives. The words in cl. 7 " would have been entitled had she survived " clearly indicate an intention on the part of the testatrix that the legatee shall not be entitled to the property unless she has survived. It includes the intention to withhold the entitling till the time of survivorship has arrived. [Reference was also made to Williams on Executors, 11th ed., vol. ii. p. 990; 12th ed., vol. ii. p. 801; to *Ward* v. *Brown* (2); and *Salisbury* v. *Petty*. (3)] If the legacies directed to be paid by cl. 5 of the will are held to be vested, they are in any event not vested absolutely or indefeasibly, but each legacy is, under cl. 7, liable to be divested in favour of the children of the legatee in the event of that legatee predeceasing the testatrix's son.

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(1) (1880) 16 Ch. D. 112.
(2) [1928] S. C. R. 479.
(3) 41 O. W. N. 214, 365.
(4) Ibid. 34.

G. A. Urquhart K.C. for the executors, William George Hamilton Browne and Thomas Cameron. Mr. Watt is the agent of the executors, and the fund is for distribution by them at some future period.

July 27. The judgment of their Lordships was delivered by

LORD MACMILLAN. In this appeal their Lordships have to determine the interpretation and effect of certain provisions in the will of the late Mrs. Katherine Hamilton Browne, of Toronto. The testatrix died on March 17, 1930. She was survived by a son, William George Hamilton Browne, and three daughters, Mrs. Florence Moody, Mrs. Constance Kinnear and Mrs. Helen Smith; she was also survived by a grand-daughter, Enid Browne, the daughter of her son, William George Hamilton Browne.

By her will, which was dated December 16, 1929, the testatrix appointed executors and, after certain specific bequests in favour of her son, she gave directions with regard to a sum of $100,000 in the following terms, which it is necessary to quote textually, as the arguments in the appeal turned largely upon the precise language employed :—

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(1) [1928] S. C. R. 479.
(2) [1916] 2 A. C. 121.
(3) (1843) 3 Hare, 86.

" 5. Whereas I have now the sum of $100,000.00 invested in the name of E. H. Watt, of the said firm of Watt & Watt, in trust in the form of a call loan, I hereby direct that the said fund is to be continued to be invested in call loans by the said E. H. Watt during the lifetime of my said son William George Hamilton Browne, and the income arising therefrom is to be paid to my said son during his lifetime. In the event of the death of the said E. H. Watt during the lifetime of my said son, I direct that the fund now invested by him in the form of a call loan shall be invested by my executors in such securities as are authorized by the laws of the Province of Ontario as trustee investments, and the income therefrom is to be paid to my said son during his lifetime. On the death of my said son, William George Hamilton Browne, I direct that the said fund of $100,000.00 is to be divided as follows :—One half of the said fund to my grand-daughter Enid Browne, daughter of my son, William George Hamilton Browne, and the remainder of the said fund to be divided equally between my daughters, Florence Yoda Moody, wife of Robert E. Moody, now of Los Angeles, California ; Constance Emma Kinnear, wife of Harold Kinnear, of the City of Detroit, in the State of Michigan, and Helen Smith, wife of Herbert P. Smith, of Jamaica, Long Island, New York, share and share alike."

By the sixth purpose of her will the testatrix gave devised and bequeathed all the rest and residue of her estate, both real and personal, to her grand-daughter Enid and her three daughters, Florence, Constance and Helen, to be divided amongst them equally, share and share alike. The seventh clause, the only other clause which need be considered, reads as follows :—

" 7. In the event of my grand-daughter, Enid Browne, or any of my said daughters predeceasing me or predeceasing my said son, leaving issue, I direct that the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived."

It will be observed that all the beneficiaries mentioned in the fifth, sixth and seventh purposes of the will survived the testatrix. They are all still alive. Each of the three daughters is married and has issue. The items specifically bequeathed by the testatrix to her son and the fund of $100,000.00 as to which she gave the directions above quoted constituted the bulk of her estate, and their Lordships were informed that the residue is negligible in amount.

In 1932, by originating motion in the High Court Division of the Supreme Court of Ontario, at the instance of the son of the testatrix, who was one of her executors as well as a legatee under her will, the question was raised whether the grand-daughter and daughters of the testatrix had vested interests in the $100,000.00 fund. At the initiation of the proceedings the grand-daughter Enid was an infant and she, as well as the infant children of the daughters, Florence and Constance, and the unborn children of all three daughters, were represented by the official guardian, for whom the Attorney-General for Ontario appeared at their Lordships' bar. In the course of the proceedings the grand-daughter Enid came of age and she is now the appellant in the appeal, the respondents being the three daughters, the official guardian, the executors of the will, and the daughter (who is of age) of Mrs. Helen Smith. There being a question as to whether all parties were represented before their Lordships it was intimated that counsel had now received complete instructions, and that the necessary formal steps would be taken to enter appearance for the parties not previously represented in the appeal.

The learned Chief Justice of the High Court for Ontario found himself unable "to distinguish the gift to the grand-daughter and the daughters from the gifts in *Re Gilmour* (1) and *Re Gaukel* (2), which were held to be covered by the rule stated in *Busch* v. *Eastern Trust Co.* (3)" Regarding himself as bound to follow these judgments the learned Chief Justice held that no vested interest in the fund in question was acquired by the grand-daughter and daughters at the death of the testatrix. The *Busch* case (1), having been previously followed by the Court of Appeal for Ontario in several cases involving the same question (including the case of *Re Gaukel* (2), which was affirmed by the Court of Appeal), leave was applied for and granted to appeal against the judgment of the learned Chief Justice per saltum direct to the Supreme Court of Canada. A special case was subsequently adjusted and presented to the Supreme Court in which the following questions were submitted :—

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(1) (1932) 41 O. W. N. 34.

(2) Ibid. 215, 365.

(3) [1928] S. C. R. 479.

" (*a*) Whether or not the legacies directed by the said testatrix, Katherine Hamilton Browne, deceased, under para. 5 of her said will, to be paid to Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith (the appellants herein) upon the death of the life tenant, William George Hamilton Browne, became vested upon the death of the said testatrix ?

" (*b*) And should this Honourable Court find that such legacies did become vested upon the death of the testatrix, then, whether or not the legacy of any of such appellants is liable to be divested under or otherwise affected by para. 7 of the said will ? "

The Supreme Court answered question (*a*) in the negative and question (*b*) accordingly did not arise. The reasons for this judgment were delivered by Rinfret J. and were concurred in by the learned Chief Justice of Canada and Smith, Cannon and Hughes JJ. From these it appears that the grounds of the decision were, first, that there are in cl. 5 no words of present gift to the grand-daughter and daughters, but only a direction to divide the fund among them on the occurrence of the son's death. " According to the words she uses, grammatically and literally, the testatrix gives when she divides " (3) ; second, that " the fund is really treated as separate and distinct from the estate disposed of in the will " (4) and "there is nothing in para. 5 necessarily indicating that, except in the event mentioned [Mr. Watt's death], the executors are to have anything whatever to do with the fund. In terms, it is not given to them either in trust or otherwise" (1); third, that the language used by the testatrix in cl. 5 differs from that which she uses in "every other clause of the will where the testatrix makes a bequest with the evident intention that it should become vested at once. Invariably and in each case without exception the testatrix says: 'I give, devise and bequeath.'" (1) The contrast "evidences a desire to postpone the operation of the gift to the appellants until the period of distribution" (1); finally, that the words in cl. 7, "the interest to which their mother would have been entitled had she survived," read fairly and literally, mean that "the mother (i.e., any of the appellants) takes no title to that interest unless she survives both the testatrix and her son, and that is to say: till the time of distribution." (2) The learned judge further stated that the *Busch* case (3) ought not to be cited as deciding more than was there actually decided, and that there was no intention in that case of laying down a rule of general application. The argument which their Lordships heard from the Attorney-General in support of the judgment followed the same lines.

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(1) [1928] S. C. R. 479.
(2) (1932) 41 O. W. N. 215, 365.
(3) [1934] S. C. R. 329.
(4) Ibid. 328.

Their Lordships do not find themselves in agreement with the decision of the Supreme Court. They fully recognize, with Rinfret J., that the golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language which he has used; but in the present instance they do not find manifested in the language of the testatrix the intention which the Supreme Court have distilled from it. The testatrix has made her testamentary dispositions in terms of very ordinary occurrence from which the Courts in a long series of cases have drawn a contrary inference as to intention.

Their Lordships observe, in the first place, that the date of division of the capital of the fund is a dies certus, the death of the son of the testatrix, which in the course of nature must occur sooner or later. In the next place, the direction to divide the capital among the named beneficiaries on the arrival of that dies certus is not accompanied by any condition personal to the beneficiaries, such as their attainment of majority or the like. The object of the postponement of the division is obviously only in order that the son may during his lifetime enjoy the income. The mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of the capital.

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(1) [1934] S. C. R. 329. (2) Ibid. 330.
(3) [1928] S. C. R. 479.

The distinction between a present gift coupled with a postponement of the date of payment and a direction to pay at a future date without any words of present gift is no doubt an important distinction, and is in certain circumstances an element in determining whether vesting a morte testatoris has or has not taken place, as where conditions of survivorship and the like are adjected to the direction to pay. But where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place a morte testatoris in the remaindermen. The principle is thus stated in Jarman on Wills, 7th ed., vol. ii. p. 1377: "Even though there be no other gift than in the direction to pay or distribute in futuro; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. Thus, where a sum of stock is bequeathed to A. for life; and, after his decease, to trustees, upon trust to sell and pay and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D.; as the payment or distribution is evidently deferred until the decease of A., for the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator." As the learned editor points out, Sir J. Wigram V.-C. in *Packham* v. *Gregory* (1) "expressed his entire concurrence in the doctrine thus stated by Mr. Jarman,

(1) 4 Hare, 396, 398.

which is further supported by numerous authorities." Their Lordships refer to the admirable opinion of Middleton J.A. in *Re McFarlane.* (1) The learned judge in that case felt himself constrained, with his colleagues of the Court of Appeal for Ontario, to bow to the decision in *Busch's* case (2), but he indicated that otherwise he would have reached a different conclusion. In the course of his opinion he cited the case of *In re Bennett's Trust* (3), in which Sir William Page Wood V.-C. used words which may here be repeated (4): "It is clear that the use of the words 'pay and transfer,' as the only words of gift, does not make such a bequest contingent. The true criterion is that which is mentioned in *Leeming* v. *Sherratt* (5), namely, whether the postponement of the payment or division was on account of the position of the property, or of the person to whom the deferred interest is given. If the reason is simply, that a life interest is previously given to another person, so that the fund cannot be divided or paid over until his death, and is not a reason personal to the legatee of the absolute interest, such as his attaining twenty-one, it is treated as a gift to one for life, with a vested remainder to the legatees who are to take subject to the life interest." Middleton J.A. then quotes from the 8th ed. of Theobald on Wills, p. 656, the following passage based on the case just quoted and others: "When the only gift is to be found in the direction to pay or divide :—(*a*) if the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life, ... and a direction to pay upon the decease of the legatee for life, ... the gift in remainder vests at once . . . . (*b*) But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time."

Their Lordships are of opinion that the law is correctly stated in these quotations. In *Busch's* case (2) Newcombe J. referred to a passage in Williams on Executors, 11th ed., p. 981 (now 12th ed., pp. 795–6), as supporting the view which that learned judge and the other members of the Supreme Court adopted. The words are: "Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer 'from and after' a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected." The learned judge adds (1): "To the like effect is the text of Mr. Jarman's original edition, as incorporated in the sixth edition at p. 1399" (7th ed., p. 1376). But, as has been seen above, Mr. Jarman in the subsequent passage which has been quoted, substantially qualified the generality of his statement, and indicated its inapplicability to cases such as the present. Similarly, the view expressed in the passage which Newcombe J. quoted from Williams on Executors is recognized by the learned author a few pages further on (12th ed., p. 802) as not universally accepted, and as possibly subject to qualification, and in this connection he refers to Mr. Jarman's limitation of its application with which their Lordships agree.

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(1) [1934] O. R. 383, 387 et seq.

(2) [1928] S. C. R. 479.

(3) 3 K. & J. 280.

(4) Ibid. 283.

(5) 2 Hare, 14.

Adverting to the other reasons which influenced the Supreme Court in reaching their decision in the present case, their Lordships do not find any special significance, indicative of a different intention, in the contrast between the expressions "I give, devise and bequeath" or "I give and bequeath" used in the case of the legacies payable on the death of the testatrix and the words "I direct that the said fund of $100,000.00 is to be divided, etc." used in the case of the destination of that fund. The difference would appear to be occasioned simply by the circumstance that in the one set of instances the testatrix was giving ordinary legacies immediately payable, whereas in the case of the $100,000.00 fund she desired to give a series of rather elaborate directions. Their Lordships also disagree with the view that the executors of the testatrix are in some way disassociated from the $100,000.00 fund. The whole interest of the testatrix in the fund necessarily passed to the executors on her death, and they immediately became responsible for its due administration: see the Ontario

(1) [1928] S. C. R. 486.

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Devolution of Estates Act, 1927, R. S. O. c. 148 s. 2. The directions of the testatrix with regard to it are directions which it is the duty of the executors to see carried into effect. Nor do their Lordships draw from the language of cl. 7 of the will any inference that the testatrix intended to postpone vesting till the period of division. The words " would have been entitled had she survived " they read as merely demonstrative of the share in question and not as intended to qualify the title to such share.

As Rinfret J. in giving the reasons of the Supreme Court did not profess to rely on the previous decision of the Court in *Busch's* case (1) and protested against the view that that case had laid down any rule of general application, it would be unnecessary for their Lordships to refer to it were it not that it appears to have been treated as a binding authority, at least in the Courts of Ontario, in the present as well as in other cases. Their Lordships, having read the opinion of Newcombe J., confess to having some sympathy with the judges who found in *Busch's* case (1) a definite enunciation, or at least a definite application, of the principle that, if there are no words of present gift but only a direction to pay or divide at a future time, vesting is postponed to that future time. The observations of the learned judge himself on what was decided in *Busch's* case (1), in the subsequent case of *Singer* v. *Singer* (2), point in the same direction. It is perhaps sufficient to say that if any such principle is laid down by *Busch's* case (1) their Lordships cannot countenance it.

Their Lordships accordingly are of opinion that the first question submitted to the Supreme Court should be answered not in the negative but in the affirmative. This necessitates a consideration of the second question which, on the view of the Supreme Court, did not arise. In their Lordships' opinion the destination-over in cl. 7 of the will is plainly applicable to the legacies in cl. 5. It was suggested that it applied only to the immediately preceding bequest of residue, but the contingency of the legatees predeceasing the son of the testatrix is inapplicable to the bequest of residue, which admittedly

(1) [1928] S. C. R. 479.

(2) [1932] S. C. R. 44, 49.

vests a morte, and is appropriate only to the legacies in the fifth clause. As to the effect of cl. 7 their Lordships entertain no doubt. All the legatees have survived the testatrix, so that the only contingency now affecting them is the contingency of predeceasing the son of the testatrix "leaving issue." A legatee predeceasing the son without leaving issue would not be affected by the clause and the interest of such a legatee would pass on her death to her representatives. But the contingency of death "leaving issue," with the gift-over in that event to such issue, is, in their Lordships' opinion, effectual to render the legacies subject to defeasance or divestiture in that event. The contingency of predecease "leaving issue," in other words, is a resolutive, though not a suspensive condition; it does not prevent vesting a morte but it prevents that vesting from being absolute, and renders it subject to divestiture in the event of this specified contingency happening. This is in accordance with well-settled principles.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment of the Chief Justice of the High Court for Ontario, dated March 25, 1933, so far as declaring that the legacies directed by the testatrix in cl. 5 of her will to be paid to the beneficiaries therein named did not become vested upon the death of the testatrix, and the judgment of the Supreme Court of Canada, dated March 6, 1934, (except so far as it deals with costs) should be recalled, and that the case should be remitted to the Supreme Court with directions to answer the questions appended to the special case as follows:—Question (*a*) The legacies referred to became vested upon the death of the testatrix: Question (*b*) The legacies referred to are liable to be divested in the case of any legatee who predeceases the son of the testatrix leaving issue. The costs of all parties as between solicitor and client to the appeal will be borne by the capital of the $100,000.00 fund.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

END OF VOLUME AND OF APPELLATE SERIES FOR 1936.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1936, will be as follows :—

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3. —— *Sale of Goods — Woollen underwear — Defective condition — Chemical irritant—Latent defect—Dermatitis contracted—Breach of implied condition—Retailer liable in contract—Negligence in manufacture—Liability in tort—South Australia Sale of Goods Act,* 1895 (58 *&* 59 *Vict., No.* 630), *s.* 14, *sub-ss.* 1, 2.

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4. —— *Workmen's compensation — Industrial disease—Pulmonary fibrosis—Due to inhalation of dust in coal-mine—Whether caused by silica dust—Onus of proof—Construction of Statute—Coal-miner unprotected if disease due to silica dust—New South Wales Workers' Compensation Act,* 1926-1929 (*Geo.* 5, *No.* 15 *of* 1926—*No.* 36 *of* 1929), *s.* 5 ; *s.* 6, *sub-s.* 1 ; *s.* 7, *sub-s.* 1—*Workmen's Compensation* (*Silicosis*) *Act,* 1920 (*Geo.* 5, *No.* 13 *of* 1920).

Order of the High Court of Australia [1934] 50 C. L. R. 614, affirmed. METROPOLITAN COAL CO. *v.* PYE - - - **J. C. 343**

BANK — Foreign — Dissolution — English branch—Winding-up - - **405**
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BANKER—Deposit of share certificates to secure overdraft—Sale by bank **222**
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BRIDGE—Carrying highway over railway—Liability for repair of highway **365**
See Railway Company.

BY-LAW—*Ultra vires*—*Unreasonableness—Uncertainty — Petroleum filling stations — Application of Model By-laws—Petroleum (Consolidation) Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 32), *s.* 11.
Interlocutor of the First Division of the Court of Session affirmed. Robert Baird, Ld. and Others *v.* City of Glasgow **H. L. (Sc.) 32**

CANADA **(Alberta)** — *Divorce — Irregularity in Procedure—Trial not in Open Court—Decrees Nisi and Absolute — Voidable not void—Expiry of time for appeal—Subsequent remarriage of petitioner—Decrees unassailable —Divorce and Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85, *Imp.*), *s.* 57.
Judgment of the Supreme Court of Alberta (Appellate Division [1933] 2 D. L. R. 244, affirmed. McPherson, C. L. *v.* McPherson, O. L. - - - - - **J. C. 177**

2. —— —— *Negligence — Damages — Gas main—Excavation work by Local Authority beneath main—Leakage of gas—Building destroyed by fire—Failure of Gas Company to inspect city's operations—Breach of duty—Liability for loss—" Locate and Construct "—Water, Gas, Electric and Telephone Companies Act, R. S. A.*, 1922, *c.* 168, *s.* 13.
Judgment of the Supreme Court of Alberta (Appellate Division) [1935] 1 D. L. R. 135; (1934) 3 W. W. R. 641 affirmed. North-Western Utilities Ld. *v.* London Guarantee and Accident Co. - - **J. C. 108**

3. —— **(Quebec)**—*Municipal Law—Municipal and School Taxes—Telephone switchboard—Not " Immoveable by its nature "—Incorporation with, or adherence to, the soil—Civil Code, art.* 376—*Cities and Towns' Act* (*R. S. Q.*, 1925, *c.* 102), *s.* 521—*Education Act* (*R. S. Q.*, 1925, *c.* 133), *s.* 249.
Judgment of Court of King's Bench, Quebec (Appeal Side) (1934) Q. R. 57 K. B. 11 reversed. Bell Telephone Co. of Canada *v.* Ville St. Laurent - - - **J. C. 73**

4. —— *Will — Construction — Direction to pay income of fund to beneficiary during his lifetime—Fund to be divided amongst named persons on his death—No direct words of gift either of life interest or of capital—No condition personal to remaindermen—Capital vested in them a morte testatoris.*
Judgment of the Supreme Court of Canada [1934] S. C. R. 342 reversed. Browne *v.* Moody - - - - - - **J. C. 635**

CARGO—Improper loading - - **65**
See Negligence **2.**

CASES :—

—— *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* [1934] A. C. 122.
Distinguished. Payne *v.* Deputy Federal Commissioner of Taxation - - - **J. C. 497**

—— *Alfred Leney & Co.* v. *Whelan* [1934] 2 K. B. 511.
Affirmed - - - - **393**

—— *Ames, In re* (1841) 3 Moo. P. C. 409.
Dicta at p. 412 approved and applied. Renouf *v.* Att.-Gen. for Jersey - - **J. C. 445**

—— *Att.-Gen.* v. *Midland Ry. Co.* (1908) 99 L. T. 961; (1909) 100 L. T. 866.
Discussed. London and North Eastern Ry. Co. *v.* North Riding of Yorkshire County Council **H. L. (E.) 365**

—— *Australian Knitting Mills, Ld.* v. *Grant* (1933) 50 C. L. R. 387.
Reversed - - - - **85**

—— *Barrett* v. *London General Insurance Co.* [1935] 1 K. B. 238.
Reasoning of Goddard J. disapproved. Trickett *v.* Queensland Insurance Co. - **J. C. 159**

—— *Bennett's Trust, In re* (1857) 3 K. & J. 280.
Dicta at p. 283 approved. Browne *v.* Moody - - - **J. C. 635**

—— *Blackwell, In re. Blackwell* v. *Blackwell* [1926] 1 Ch. 223.
Principle stated at pp. 233-234 approved and applied. Bickersteth *v.* Shanu - - - **J. C. 290**

—— *Box* v. *Jubb* (1879) 4 Ex. D. 76.
Considered. Northwestern Utilities, Ld. *v.* London Guarantee and Accident Co. - **J. C. 108**

—— *British Coal Corporation* v. *The King* [1935] A. C. 500.
Referred to. Renouf *v.* Att.-Gen. for Jersey - - **J. C. 445**

—— *Browne, In re* [1934] S. C. R. (Can.) 324.
Reversed sub nom. Browne *v.* Moody - - - - - **635**

—— *Cammell Laird & Co., Ld.* v. *Manganese Bronze and Brass Co., Ld.* [1934] A. C. 402.
Referred to. Grant *v.* Australian Knitting Mills, Ld. - **J. C. 85**

CASES—*continued.*

—— *Cory* v. *Bristow* (1877) 2 App. Cas. 262. Approved. WESTMINSTER COUNCIL *v.* SOUTHERN RY. CO., ETC., AND W. H. SMITH & SON, LD. WESTMINSTER COUNCIL AND KENT VALUATION COMMITTEE *v.* SOUTHERN RY. CO., ETC., AND PULLMAN CAR CO. - - - **H. L. (E.) 511**

—— *De Silva* v. *King* (1934) 36 Ceylon N. L. R. 57. Affirmed - - - - **306**

—— *Dillet, In re* (1887) 12 App. Cas. 459. Principle applied. RENOUF *v.* ATT.-GEN. FOR JERSEY - **J. C. 445**

—— *Dimes* v. *Proprietors of the Grand Junction Canal* (1852) 3 H. L. C. 759. Principle applied by analogy. MCPHERSON, C. L. *v.* MCPHERSON, O. L. - - - - **J. C. 177**

—— *Donoghue* v. *Stevenson* [1932] A. C. 562. Principle Applied. GRANT *v.* AUSTRALIAN KNITTING MILLS, LD. **J. C. 85**

—— *Duffield* v. *Duffield* (1829) 3 Bligh N. S. 260. Principle stated at p. 331 approved and applied. BICKERSTETH *v.* SHANU - - - - **J. C. 290**

—— *Earl Cowley* v. *Commissioners of Inland Revenue* [1899] A. C. 198. Applied. CHRISTIE *v.* THE LORD ADVOCATE - **H. L. (Sc.) 569**

—— *Esnouf* v. *Att.-Gen. for Jersey* (1883) 8 App. Cas. 304. Dicta at p. 307 approved and applied. RENOUF *v.* ATT.-GEN. FOR JERSEY - - - **J. C. 445**

—— *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.* [1934] 2 K. B. 132. Reversed - - - - **206**

—— *Fry* v. *Salisbury House Estate, Ld.* [1930] A. C. 432. Applied. WHELAN *v.* ALFRED LENEY & CO. LOUGHNAN *v.* MARSTON'S DOLPHIN BREWERY, LD. **H. L. (E.) 393**

—— *Hewlett* v. *Allen* [1894] A. C. 383. Distinguished. PENMAN *v.* FIFE COAL CO., LD. - **H. L. (Sc.) 45**

—— *Hillen and Another* v. *I. C. I. (Alkali), Ld.* [1934] 1 K. B. 455. Affirmed - - - - - **65**

—— *Holywell Union* v. *Halkyn District Mines Drainage Co.* [1895] A. C. 177. Approved. WESTMINSTER COUNCIL *v.* SOUTHERN RY. CO., ETC., AND W. H. SMITH & SON, LD. WESTMINSTER COUNCIL AND KENT VALUATION COMMITTEE *v.* SOUTHERN RY. CO., ETC., AND PULLMAN CAR CO. - - - **H. L. (E.) 511**

—— *Ibrahim* v. *The King* [1914] A. C. 599. Observations at p. 615 applied. ATTYGALLE *v.* THE KING - **J. C. 338** and RENOUF *v.* ATT.-GEN. FOR JERSEY - - - - **J. C. 445**

—— *Inland Revenue Commissioners* v. *Blott* [1921] 2 A. C. 171. Applied. COMMISSIONER OF INCOME-TAX, BENGAL *v.* MERCANTILE BANK OF INDIA, LD. - - **J. C. 478**

—— *Inland Revenue Commissioners* v. *Fisher's Executors* [1926] A. C. 395. Applied. COMMISSIONER OF INCOME-TAX, BENGAL *v.* MERCANTILE BANK OF INDIA, LD. - - **J. C. 478**

—— *James* v. *Commonwealth* (1935) 52 C. L. R. 570. Reversed . - - - **578**

—— *James* v. *Cowan* [1932] A. C. 542. Considered. JAMES *v.* COMMONWEALTH OF AUSTRALIA - **J. C. 578**

—— *Jivanji* v. *Jivanji* Kenya L. R., 1929-30, vol. 12, 41. Approved and applied. RIBEIRO *v.* SIQUEIRA E. FACHO - **J. C. 300**

—— *Lancashire & Yorkshire Ry. Co.* v. *Mayor, etc., of Bury* (1899) 14 App. Cas. 417. Followed and applied. LONDON AND NORTH EASTERN RY. CO. *v.* NORTH RIDING OF YORKSHIRE COUNTY COUNCIL - **H. L. (E.) 365**

—— *London and North Western Ry. Co.* v. *Buckmaster* (1875) L. R. 10 Q. B. 70, 444. Disapproved. WESTMINSTER COUNCIL *v.* SOUTHERN RY. CO., ETC., AND W. H. SMITH & SON, LD. WESTMINSTER COUNCIL AND KENT VALUATION COMMITTEE *v.* SOUTHERN RY. CO., ETC., AND PULLMAN CAR CO. - - **H. L. (E.) 511**

CASES—*continued.*

—— *London Guarantee and Accident Co.* v. *Northwestern Utilities, Ld.* (1935) 1 D. L. R. 135; (1934) 3 W. W. R. 641.
Affirmed - - - - **108**

—— *London Midland and Scottish Ry. Co.* v. *Assessor of Railways and Canals, Scotland* 1933, S. C. 590.
Referred to. The Railway Assessment Authority *v.* The S. R. Co. The L.C.C., Etc. *v.* The S. R. Co. and The Railway Assessment Authority - - **H. L. (E.) 266**

—— *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry, Ltée.* (1926) S. C. R. 655.
Observations at pp. 668, 670 approved. Bell Telephone Co. of Canada *v.* Ville St. Laurent **J. C. 73**

—— *Lyon, In re (deceased), Lyon* v. *Public Trustee* [1934] N. Z. L. R. 296.
Affirmed - . - - **166**

—— *Markland* v. *Manchester Corporation* [1934] 1 K. B. 566.
Affirmed - - - - **360**

—— *McArthur, W. & A., Ld.* v. *State of Queensland* (1920) 28 C. L. R. 530.
Considered. James *v.* Commonwealth of Australia - **J. C. 578**

—— *McLeod* v. *St. Aubyn* [1899] A. C. 549.
Followed. Ambard *v.* Att.-Gen. for Trinidad and Tobago **J. C. 322**

—— *McPherson* v. *McPherson* [1933] 2 D. L. R. 244.
Affirmed - - - - **177**

—— *Medway Oil and Storage Co., Ld.* v. *Silica Gel Corporation* (1928) 33 Com. Cas. 195.
Referred to. Grant *v.* Australian Knitting Mills, Ld. - **J. C. 85**

—— *Montreal Light, Heat and Power Consolidated* v. *City of Outremont* [1932] A. C. 423.
Explained. Bell Telephone Co. of Canada *v.* Ville St. Laurent **J. C. 73**

—— *Montreal Light, Heat and Power Consolidated* v. *City of Westmount* (1926) S. C. R. 515.
Explained. Bell Telephone Co. of Canada *v.* Ville St. Laurent **J. C. 73**

—— *Nadan* v. *The King* [1926] A. C. 482.
Referred to. Renouf *v.* Att.-Gen. for Jersey - - **J. C. 445**

CASES—*continued.*

—— *Payne* v. *Deputy Federal Commissioner of Taxation* (1934) 51 C. L. R. 197.
Affirmed - - - - **497**

—— *Penman* v. *Fife Coal Co., Ld.* (1934) S. C. 254.
Reversed - - - - **45**

—— *Pye* v. *Metropolitan Coal Co.* [1934] 50 C. L. R. 614.
Affirmed - - - - **343**

—— *Raffan* v. *Canadian Western Natural Gas Light Heat and Power Co.* (1914) 7 A. L. R. 459; 8 W. W. R. 676.
Disapproved in part. North-western Utilities, Ld. *v.* London Guarantee and Accident Co. **J. C. 108**

—— *Rainy* v. *Justices of Sierra Leone* (1852-3) 8 Moo. P. C. 47.
Dissented from. Ambard *v.* Att.-Gen. for Trinidad and Tobago **J. C. 322**

—— *Reg.* v. *Gray* [1900] 2 Q. B. 36.
Dicta at p. 40 applied. Ambard *v.* Att.-Gen. for Trinidad and Tobago - - - - **J. C. 322**

—— *Rex* v. *West Midland Traffic Area Licensing Authority. Great Western Ry. Co. Ex Parte* [1935] 1 K. B. 449.
Affirmed - - - - **128**

—— *Ribeiro* v. *Siqueira E. Facho* L. R. of Court of Appeal for Eastern Africa, 1934, vol. I., 1.
Affirmed - - - - **300**

—— *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330.
Considered. Northwestern Utilities, Ld. *v.* London Guarantee and Accident Co. - **J. C. 108**

—— *Scott* v. *Scott* [1912] P. 241; [1913] A. C. 417.
Applied. McPherson, C. L. *v.* McPherson, O. L. - **J. C. 177**

—— *Smith* v. *Lambeth Assessment Committee* (1882) 10 Q. B. D. 327.
Overruled. Westminster Council *v.* Southern Ry. Co., etc., and W. H. Smith & Son, Ld. Westminster Council and Kent Valuation Committee *v.* Southern Ry. Co., etc., and Pullman Car Co. **H. L. (E.) 511**

—— *Soysa* v. *Soysa* (1916) 19 Ceylon N. L. R. 136.
Considered. Hulme-King *v.* De Silva - - - - **J. C. 306**

CASES—*continued.*

—— *Surendranath Banerjea* v. *Chief Justice and Judges of the High Court of Bengal* (1883) L. R. 10 I. A. 171. Considered. AMBARD *v.* ATT.-GEN. FOR TRINIDAD AND TOBAGO **J. C. 322**

—— *Swan Brewery Co., Ld.* v. *The King* [1914] A. C. 231. Distinguished. COMMISSIONER OF INCOME-TAX, BENGAL *v.* MERCANTILE BANK OF INDIA, LD. **J. C. 478**

—— *Trickett* v. *Queensland Insurance Co., Ld.* [1932] N. Z. L. R. 1727. Affirmed - - - - - **159**

—— *Ville St. Laurent* v. *Bell Telephone Co. of Canada* (1934) Q. R. 57 K. B. 11. Reversed - - - - - - **73**

—— *Young* v. *Liverpool Assessment Committee* [1911] 2 K. B. 195. Approved. WESTMINSTER COUNCIL *v.* SOUTHERN RY. CO., ETC., AND W. H. SMITH & SON, LD. WESTMINSTER COUNCIL AND KENT VALUATION COMMITTEE *v.* SOUTHERN RY. CO., ETC., AND PULLMAN CAR CO. **H. L. (E.) 511**

CEYLON—*Husband and Wife—Decree nisi of divorce on husband's petition—Settlement on husband out of property of wife—Reduced on appeal—Pending appeal to Privy Council—Application by wife for decree absolute—Compromise agreement—Husband's objection to decree absolute withdrawn—Appeal to Privy Council abandoned—Financial settlement terms—Public policy—Adjustments of decrees and certification—Ceylon Civil Procedure Code, No. 2 of 1889, ss. 349, 604, 605 and 617—Married Women's Property Ordinance, No. 18 of 1923, s. 5.*

Decree of the Supreme Court of Ceylon (1934) 36 Ceylon N. L. R. 57, affirmed. HULME-KING *v.* DE SILVA - - **J. C. 306**

2. —— *Practice—Criminal charge—Facts especially within knowledge of accused—Onus of proof not on accused—Ceylon Evidence Ordinance, No. 14 of 1895, s. 106—Principles applicable to the granting of special leave to appeal in criminal cases.*

ATTYGALLE *v.* THE KING - **J. C. 338**

COMPANY.
See PRIVATE COMPANY.

2. —— Bonus debentures—Issued to shareholders from capitalized undistributed profits—Not taxable income - - - - - **478**
See INDIA.

COMPANY—*continued.*

3. —— *Procedure—Russian Bank with London Branch—Dissolution by Russian Law—Winding-up of company as an unregistered company—Action by liquidator in name of company—Company revived for purposes of liquidation—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 190; *s.* 191, *sub-s.* 1; *s.* 338, *sub-ss.* 1 (*d*), 2; *s.* 342.

RUSSIAN AND ENGLISH BANK AND FLORANCE MONTEFIORE GUEDALLA *v.* BARING BROTHERS & CO. - - - - - **H. L. (E.) 405**

4. —— Profits—Undistributed—Capitalized—Issue of bonus debentures to shareholders—Not taxable income **478**
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CONSTITUTION—Australian—Construction **578**
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CONTEMPT OF COURT—Penalty imposed by Court of Record—Jurisdiction of Judicial Committee to entertain appeal - - - - - **322**
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COURT—Trial not in open - - **177**
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CRIMINAL LAW—Appeal to Privy Council in criminal cases—Principles applicable - - - - - **445**
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2. —— Facts especially within knowledge of accused—Onus of proof - - - - - **338**
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3. —— Manslaughter—Motor-car - **445**
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CROWN—Prerogative right to grant special leave to appeal - - **445**
See JERSEY.

DEBENTURE (BONUS)—Issued to shareholders from capitalized undistributed profits—Not taxable income - - - - - **478**
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DECREE—Adjustment and certification **306**
See CEYLON.

2. —— Judgment in form of - - **300**
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DEVISE—Rule of early vesting - **290**
See NIGERIA.

DIVORCE—Objection to decree being made absolute withdrawn—Compromise agreement — Financial settlement terms—Public policy - - **306**
See Ceylon.

2. —— Trial not in open court — Decrees nisi and absolute—Voidable not void - - - - **177**
See Canada.

DOMINIONS AND COLONIES.
See Australia, Canada, Ceylon, India, Jersey, New Zealand.

DOMINION TAXATION - - - **497**
See Australia **2.**

EASTERN AFRICA — *Appeal — Judgment ordering Account to be furnished—No formal Decree drawn up—Account prepared and presented—Decree drawn up—Ante-dated to date of Judgment—Appeal not timeously lodged—Party's duty to have Judgment drawn up in form of Decree—Rules of the Court of Appeal for Eastern Africa, r.* 8, *sub-r.* 1.

Decree of the Court of Appeal for Eastern Africa, L. R. of Court of Appeal for Eastern Africa, 1934, vol. I., 1, affirmed. Ribeiro *v.* Siqueira E. Facho - - - **J. C. 300**

EDUCATION — Contribution by Local Authorities towards cost to Exchequer—Levied by poor rate **352**
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ESTATE DUTY—Property passing on death
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FEDERAL INCOME TAX—Assessable income to be expressed in terms of Australian currency - - **497**
See Australia **2.**

GAS—Fracture of main—Leakage of gas—Damage by fire - - **108**
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HIGHWAY—Carried over railway by bridge—Liability for repair - - **365**
See Railway Company.

HUSBAND AND WIFE—Divorce—Objection to decree being made absolute—Compromise agreement - - **306**
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IMPLIED WARRANTY—Fitness of goods for required purpose - - **85**
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INDIA—*Revenue—Supertax and surcharge—Company's reserves—Undistributed profits—Capitalization—Issue of bonus debentures to shareholders—Redemption—Not taxable income, profits, or gains received by shareholders—Indian Income-tax Act (XI. of* 1922), *s.* 4; *s.* 66, *sub-s.* 1.

Judgment of the High Court affirmed. Commissioner of Income-tax, Bengal *v.* Mercantile Bank of India, Ld. **J. C. 478**

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2. —— (Motor-car)—Vehicle driven at night without lights—Damaged or unsafe condition within exception to policy
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INVITEE—Owners of barge—Collapse of hatch covering - - - **65**
See Negligence **2.**

JERSEY—*Appeal to Privy Council in criminal cases—No appeal as of right—Crown's prerogative right to grant special leave to appeal and to entertain appeals—Conviction of manslaughter—Alleged misdirection—Principles applicable to review of criminal proceedings by Privy Council.*

Judgment of the Royal Court of Jersey affirmed. Renouf *v.* Att.-Gen. for Jersey **J. C. 445**

2. —— *Will—Disposition of Immovables—Proceedings to determine validity—Jurisdiction of Cour du Samedi to exclusion of Cour d'Héritage—Laws of Jersey,* 1851, *art.* 28.

Judgment of the Superior Number of the Royal Court of Jersey affirmed. Gilbert *v.* Ching - - - - - **J. C. 145**

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JUDICIAL COMMITTEE APPEALS.
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2. —— Infringement of Constitutional powers - - - - - 578
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LICENCE—Motor-vehicle—Limited carriers' licence - - - - 128
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LICENSED PREMISES—Tied houses—Rent—Sch. D assessment - - 393
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LIQUIDATION—English branch of dissolved foreign company—Revived for purposes of - - - - 405
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LOCAL GOVERNMENT—Burst water service pipe—Delay in repairing—Frozen water—Accident - - - 360
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2. —— Contribution to Exchequer towards cost of education — Levied by poor rate - - - 352
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MASTER AND SERVANT—*Accident to Servant—Dangerous Machine insufficiently fenced—Action for Breach of Statutory Duty—Contributory Negligence—Disobedience to Orders—Evidence—Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22), *s.* 10, *sub-s.* 1 (*c*).

Order of the Court of Appeal [1934] 2 K. B. 132 reversed. FLOWER *v.* EBBW VALE STEEL, IRON AND COAL CO. - **H. L. (E.) 206**

2. —— *Deductions from wages—Arrears of rent — House owned by employers — Workman's father tenant—Father formerly in same employment — Claim to recover deductions—Mora and acquiescence—Truck Act,* 1831 (1 & 2 *Wm.* 4, *c.* 37), *ss.* 2, 3, 23—*Truck Act,* 1887 (50 & 51 *Vict. c.* 46), *s.* 6.

Interlocutor of the Second Division of the Court of Session (1934) S. C. 254 reversed. PENMAN *v.* THE FIFE COAL CO. LD.
H. L. (Sc.) 45

MOTOR-CAR—Driven at night without lights—Damaged or unsafe condition within exception to insurance policy - - - - - 159
See NEW ZEALAND **2.**

MOTOR-CAR—*continued.*

2. —— *Goods vehicle—Application for B Licence—Notice of Application—Area of User—Limitation—Road and Rail Traffic Act,* 1933 (23 & 24 *Geo.* 5, *c.* 53), *ss.* 2, 5, 11. *Practice—Order of Licensing Authority quashed by Writ of Certiorari—Writs of Supersedeas and Procedendo.*

Order of the Court of Appeal [1935] 1 K. B. 449 affirmed. GREAT WESTERN RY. CO. *v.* WEST MIDLAND TRAFFIC AREA LICENSING AUTHORITY - - - **H. L. (E.) 128**

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2. —— *Invitor and invitee—Owners of barge — Stevedore — Unloading cargo — Collapse of hatch covering used as staging for cargo—Support.*

Order of the Court of Appeal [1934] 1 K. B. 455 affirmed on different grounds. HILLEN AND PETTIGREW *v.* I.C.I. (ALKALI), LD. - - - - - **H. L. (E.) 65**

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4. —— Liability of manufacturer to ultimate consumer - - - - 85
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